The Yale Law Journal
Volume 93, Number 1, November 1983

Successive Representation By Criminal Lawyers

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I am indebted to my colleagues David H. Kaye and Charles A. Pulaski, Jr. for their insightful suggestions. Kathleen Foster, Marty Lieberman, Victoria McGuigan, Douglas Petroff-Tobler, Gregg Temple and Alice Walter also provided thoughtful assistance in the preparation of this Article. Finally, this Article would not have been prepared without the generous aid of Bill and Jane Canby.

> Early in my career as a public defender I represented a young man charged with rape. The police report indicated that he followed the victim off a city bus and forced her at knife point to a dark playground, where he raped her. My client told me that the woman was a prostitute and that after intercourse they squabbled over the sum he was to pay her. She became angry and cried "rape."
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> When I returned to my office I discovered from our client index that we had represented the woman on prostitution charges several times in the past. My supervisor instructed me to continue to represent the accused. He suggested that I look through the woman's old files and stated that I could use any information I found in them for cross-examination, if the information could have been obtained from independent sources, unconnected with our prior representation of the witness. When I reviewed her files I found very useful material for cross-examination in some police reports and a probation report.
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> I proceeded to cross-examine the woman extensively on her prostitution activity, relying on some of the leads obtained in her files. She became quite upset and literally came apart on the stand, although she continued to maintain that she had been raped. I went home that night feeling miserable, thinking how upset the woman was. My client was found guilty of a lesser offense, but the judge sentenced him to the Youth Authority anyway. We all emerged from court as losers.[1]

The lawyer in the illustration faced a difficult dilemma. The information he used to cross-examine the witness came into his possession as a result of a professional relationship. The witness had entered that relationship with the assumption that the public defender office would use the data in her files exclusively for her benefit. Embarrassing her with the information potentially diminished her trust in lawyers and her willingness to cooperate fully with counsel in any future situation in which she might need legal assistance.[2]

On the other hand, the lawyer had an ethical duty to represent his current client competently and zealously.[3] The Sixth Amendment obligated the public defender to investigate leads to admissible evidence that would tend to disprove or discredit the witness's testimony.[4] Failure to pursue valuable defense evidence or to cross-examine the witness thor-

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1. This account was provided by a former assistant public defender in Alameda County, California. The court proceeding took place in juvenile court in Oakland, California in December 1970.
2. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1982).
3. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canons 6 & 7 (1982).
4. *See* Washington v. Strickland, 693 F.2d 1243, 1250–58 (5th Cir. 1982); Coles v. Peyton, 389 F.2d 224, 225–26 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); *In re* Saunders, 2 Cal. 3d 1033, 1041–43, 88 Cal. Rptr. 633, 638–39, 472 P.2d 921, 926–27 (1970); Harris v. United States, 441 A.2d 268, 272 (D.C. Ct. App. 1982).

oughly might have compromised the lawyer's duty to his current client. Moreover, if the public defender had withdrawn from the case, the withdrawal could have diminished the accused's opportunity for an acquittal. Substitute counsel might not have been able to gather the information in question from independent sources, particularly under the limited criminal discovery rules of most jurisdictions.[5] These considerations convinced the lawyer to use the information during cross-examination.

The illustration also highlights difficult problems regularly confronting the courts. The defender chose to remain in the case and cross-examine the witness with some, but not all, of the information he found in her file. Should a reviewing court reverse the defendant's conviction on the ground that counsel failed to pursue all avenues of cross-examination?[6] Should the lawyer's divided loyalty and his failure to withdraw from the case require a new trial with independent counsel, regardless of whether the defender restrained his cross-examination? If the trial court had become aware of the prior representation, could the judge have disqualified defense counsel over objection without infringing the accused's Sixth Amendment right to continue with the counsel of his choice? If the defender had moved to withdraw from the case, would the court have been obligated to grant the motion?

This Article addresses these questions. Part I presents an empirical study of the frequency with which criminal defense lawyers confront their former clients as prosecution witnesses. The study suggests that the problem of divided loyalty raised by the illustration is commonplace for lawyers with an active criminal practice. Part II analyzes a nationwide survey of public defender offices to determine how counsel actually handle the problem. The survey shows a diversity of views concerning the appropriate action. Part III concludes that lawyers' confusion in successive representation situations reflects the ambiguity of the *Model Code of Professional Responsibility* on this issue. Part IV analyzes judicial treatment of

5. Probation Department pre-sentence investigation reports concerning persons other than the defendant, as well as police reports for cases not involving the defendant, are not among the discoverable items enumerated in the rules of any state or federal court. *See, e.g.*, FED. R. CRIM. P. 16; ARIZ. R. CRIM. P. 15; COLO. R. CRIM. P. 16; ILL. SUP. CT. R. 412; OHIO R. CRIM. P. 16; PA. R. CRIM. P. 305. The state courts generally do not permit discovery of such items as probation reports on prosecution witnesses, except perhaps under Brady v. Maryland, 373 U.S. 83, 87 (1963) (prosecutorial suppression of evidence violates due process where evidence is material to guilt or punishment). *See also* Commonwealth v. Adams, 374 Mass. 722, 732–33, 375 N.E.2d 681, 687 (1978) (upholding trial court denial of criminal and probation records of prosecution witnesses, but suggesting the records are discoverable under some circumstances).

6. Appellate courts normally will not reverse a conviction on the ground of ineffective assistance of counsel when the defense lawyer fails to pursue a line of cross-examination, if counsel's decision rests on "tactical grounds." *See* United States v. Clayborne, 509 F.2d 473, 476–77 (D.C. Cir. 1974). However, if a failure to cross-examine thoroughly can be traced to the divided loyalties of defense counsel, the result might be different. *See* Brown v. United States, 665 F.2d 271, 273 (9th Cir. 1982) (Tang, J., concurring).

post-conviction claims of ineffective assistance of counsel in situations in which prosecution witnesses are former clients of the defendant's trial lawyer. It concludes that the courts have not followed coherent rules, and it offers a framework to resolve problems of divided loyalty.

I. The Frequency with Which Criminal Defense Lawyers Confront Former Clients as Prosecution Witnesses: An Empirical Study

A. *Preliminary Observations*

A criminal defense attorney normally must retain a defendant's office file long after the conclusion of the client's case.[7] The files of former clients, sometimes referred to as "closed" files or "dead" files, frequently include a wealth of information regarding those clients and the circumstances surrounding their cases. A typical file might contain police reports, arrest records, a probation officer's pre-sentence investigation report, notes of interviews with witnesses in the former client's case, psychiatric reports, data regarding the former client's family and friends, information concerning the former client's use of drugs and alcohol, hospital records, and notations of discussions with the prosecutor, police, the court, the probation officer, and the client's family, employer, or friends. Much of this material could be detrimental or embarrassing to the former client in the hands of an adversary. The information could significantly increase the effectiveness of a hostile cross-examination of the former client.

Despite a substantial body of appellate decisions concerning the potential conflict of interest when a criminal lawyer cross-examines a former client,[8] little is known about the frequency of this practice. Nor have researchers systematically examined how lawyers actually exercise their professional judgment in deciding whether to cross-examine a former client, how to avoid ethical problems when preparing and conducting cross-examination, and whether to use information learned in the course of an earlier lawyer-client relationship for the benefit of the current accused. Answers to these questions would be useful both for an analysis of whether existing rules of professional responsibility provide sufficient

7. The lawyer's notes and records may be essential for a variety of subsequent proceedings. For example, the judgment may be appealed immediately or may be collaterally attacked years later. The defendant may petition the court to reduce his sentence or expunge his records long after conviction. If the defendant has been placed on probation or parole, subsequent proceedings for revocation may, and frequently do, occur. Even when a convicted defendant is no longer on probation or parole, he may wish to petition the court for a restoration of his civil rights. Finally, a dispute may arise between counsel and a former client over a matter related to the representation.

8. *See* Part IV, *infra*, for a discussion of these decisions.

guidance to practitioners, and for determining whether court procedures adequately protect the rights of both witnesses and defendants.

Understanding the frequency and magnitude of successive representation problems would be especially helpful in deciding whether to establish court procedures similar to those followed in joint representation cases. Joint representation of co-defendants in criminal cases also involves a substantial risk of conflict of interest.[9] Thus, trial judges in many jurisdictions are required to explain the risks of divided loyalty to jointly represented co-defendants and to determine if each defendant has made an intelligent decision to proceed with shared counsel.[10] This procedure helps to assure adequate protection of each co-defendant's constitutional right to a lawyer with undivided loyalty.[11]

A similar rule could be applied whenever a former client of defense counsel is scheduled to testify for the government. However, one critical difference between joint representation and successive representation could make implementation of such a rule in the latter situation both costly and burdensome. Although the very fact of joint representation immediately alerts the trial court to the risk that a conflict of interest may develop, both the trial judge and the accused may be unaware that defense counsel faces a potential conflict because of an undisclosed prior representation of a key prosecution witness. A preventative rule would require the government to disclose the identity of its witnesses to the defense before trial, and would require defense counsel to notify the court promptly of any earlier representation. The substitutions of counsel occasioned by such a rule might result in further expense and delay.[12]

These problems do not preclude the adoption of a court-imposed procedure to minimize the risk of a conflict of interest resulting from successive representation. However, implementation of a procedural rule that may result in expense and delay should be based on a demonstration that the problem is of significant magnitude. The benefits of a procedural change outweigh the costs only if successive representation in fact occurs in a sig-

9. *See* United States v. Carrigan, 543 F.2d 1053, 1058 (2d Cir. 1976) (Lumbard, J., concurring); United States v. Mari, 526 F.2d 117, 120–21 (2d Cir. 1975) (Oakes, J., concurring), *cert. denied*, 429 U.S. 941 (1976); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, THE DEFENSE FUNCTION § 3.5(b) (Approved Draft 1971) [hereinafter cited as ABA STANDARDS]; Geer, *Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney*, 62 MINN. L. REV. 119, 136 (1978); Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 961–63 (1978).

10. *See* FED. R. CRIM. P. 44(c); United States v. Garcia, 517 F.2d 272, 278 (5th Cir. 1975); State v. Olsen, 258 N.W.2d 898, 903–08 (Minn. 1977). *But see* Geer, *supra* note 9, at 141–42; Tague, *Multiple Representation and Conflicts of Interests in Criminal Cases*, 67 GEO. L.J. 1075, 1113–14 (1979).

11. *See* United States v. Garcia, 517 F.2d 272, 277–78 (5th Cir. 1975).

12. The implementation of such a rule is discussed in more detail *infra* pp. 43–44.

nificant number of cases and criminal lawyers treat the resulting problems improperly.

B. *Format and Scope of the Frequency Study*

To determine how often criminal defense lawyers confront their former clients as prosecution witnesses, the author studied cases handled by the Office of the Maricopa County Public Defender in Phoenix, Arizona, during a recent six-month period.[13] The study consisted of a review of court records in all prosecutions for four specified crimes of violence[14] in which the Public Defender Office served as counsel of record. Investigators recorded the names and addresses of all crime victims and other civilian witnesses subpoenaed by the government, and then compared the names, addresses, and other available indicia of the witnesses' identification with public defender records to determine which witnesses were former or current clients of the defender office.

The working hypothesis of the study was that a significant percentage of lay witnesses subpoenaed to testify against the accused in these prosecutions were former clients of the Public Defender Office. Other studies have shown that victims and offenders in violent crimes frequently come from similar socio-economic backgrounds,[15] and that victims of violent crimes tend to have prior arrest records themselves, often for violent conduct.[16] In many cities, one defender agency or a limited number of private

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13. The period in question was January 1, 1978 through June 30, 1978.

14. The four offense categories were homicide, ARIZ. REV. STAT. ANN. §§ 13-451 to -456 (repealed by Ariz. Laws 1977, ch. 142 § 63, effective October 1, 1978); rape, ARIZ. REV. STAT. ANN. § 13-611 (repealed by Ariz. Laws 1977, ch. 142, § 63, effective October 1, 1978); aggravated assault, ARIZ. REV. STAT. ANN. §§ 13-245, -249 (repealed by Ariz. Laws 1977, Ch. 142, § 61, effective October 1, 1978); and exhibiting a deadly weapon in a threatening manner, ARIZ. REV. STAT. ANN. § 13-916 (repealed by Ariz. Laws 1977, ch. 142, § 61, effective October 1, 1978). The Arizona Criminal Code was revised in its entirety by the Arizona legislature in 1977, with the new code becoming effective on October 1, 1978. All of the cases included in the study were prosecuted under the old code. No differences between the two codes were relevant to the study.

Each of these offenses is a felony under Arizona's criminal code. Felony prosecutions were selected because serious cases provide special incentives for the defense lawyer to test the credibility of key prosecution witnesses.

15. Victim surveys indicate that victims of serious violent offenses are far more likely than the general public to be non-white, unemployed, single, and school dropouts. *See* Singer, *Homogeneous Victim-Offender Populations: A Review and Some Research Implications*, 72 J. CRIM. L. & CRIMINOLOGY 779, 779-81 (1981); *see also* Dodge, Lentzner & Shenk, *Crime in the United States: A Report on the National Crime Survey*, in SAMPLE SURVEYS OF THE VICTIMS OF CRIME 5, 6, 17, 19 (W. Skogan ed. 1976).

A significant percentage of victims of violent offenses participating in self-reporting surveys have indicated that they have been members of gangs, have used knives and guns, and have committed serious assaults themselves. Singer, *supra*, at 781-82.

16. Wolfgang reported in a study of criminal homicide cases in Philadelphia over a five-year period that 47% of the homicide victims had previous arrest records, and that among the victims with a record, "over half [had] a record of one or more offenses against the person, and over a third [had] a record of aggravated assault." M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 180 (1958). The New York City Police Department recently reported that 53.3% of all homicide victims, 12% of all

lawyers represent a substantial proportion of the indigent persons charged with crimes. Indeed, some defender agencies represent as many as two-thirds of all defendants in the courts they serve.[17] It is not unusual for a single public defender office to represent tens of thousands of defendants each year.[18] The emergence of such large institutional defense offices, combined with the circumstance that prosecution witnesses frequently are former offenders themselves, suggests that many prosecution witnesses are former or current clients of defense counsel. This circumstance, if demonstrated to be true, may cause conflict of interest problems whenever defense counsel must challenge the witness's credibility or character.

C. *Results of the Study*

The data, based on a sample of 192 cases, revealed a striking difference between the extents to which the Public Defender Office opposed current and former clients.[19] As Table One indicates, only 9 of 319 prosecution witnesses, or 2.8%, were clients of the Public Defender at the time of the defendant's arraignment in the trial court. By contrast, 43 witnesses, or 13.5% of the witnesses in the cases under observation, were former clients of the Public Defender.

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drug offense victims, 10.9% of all robbery victims, and 10.4% of all assault victims had prior arrests. N.Y. Times, Aug. 28, 1977, at 34, col. 1; *see also* REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 36, 76 (1966) (38% of homicide victims and 20% of aggravated assault victims had arrest records); Amir, *Victim Precipitated Forcible Rape*, 58 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 493, 499 (1967); Pittman and Handy, *Patterns in Criminal Aggravated Assault*, 55 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 462, 468 (1964) (121 of 252 victims of aggravated assault had prior arrest records).

17. An example is the Alameda County Public Defender, which serves Oakland, California and neighboring cities. In 1982, this office handled between 60% and 65% of the total criminal cases in each of the cities it served. Letter from Dean Beaupre, Chief Assistant Public Defender, Alameda County Public Defender, to Gary Lowenthal (Mar. 1, 1983) (on file with author). In the same year, the New York Legal Aid Society represented 70% of the criminal defendants in the New York court system. Letter from Harold S. Jacobson, Special Assistant for Planning and Management, Criminal Defense Division, The Legal Aid Society of New York, to Gary Lowenthal (Feb. 28, 1983) (on file with author).

18. In 1982, the Alameda County Public Defender represented 47,785 clients. Letter from Dean Beaupre, Chief Assistant Public Defender, Alameda County Public Defender, to Gary Lowenthal (Mar. 1, 1983) (on file with author). In the same year, the New York Legal Aid Society represented 161,708 criminal clients. Letter from Harold S. Jacobson, Special Assistant for Planning and Management, Criminal Defense Division, The Legal Aid Society of New York, to Gary Lowenthal (Feb. 28, 1983) (on file with author).

19. In comparing prosecution witness lists with the Public Defender's client records, the date of the defendant's arraignment in the Superior Court (the court of general jurisdiction) was used as a point of reference to determine if the witness was a "current" or "former" client of the Public Defender Office.

TABLE ONE

FREQUENCY OF REPRESENTATION OF PROSECUTION WITNESSES BY DEFENSE COUNSEL

	Current Clients of Defense Counsel	Former Clients of Defense Counsel	No Connection with Defense Counsel	Total
Number of Prosecution Witnesses	9	43	267	319
Percentage of Prosecution Witnesses	2.8	13.5	83.7	100

This discrepancy reflects the conflict-of-interest policy of the Maricopa County Public Defender Office.[20] Like many defender agencies, the Maricopa County Public Defender makes a distinction between current and former clients testifying for the prosecution.[21] The Public Defender Office normally requests permission of the court to withdraw from representing a new defendant if a prospective prosecution witness is a current client of the office. As a result, counsel rarely cross-examines current clients. When a prospective witness is a former client, however, the Public Defender Office normally moves to withdraw from the case only if it becomes apparent that cross-examination would involve the disclosure of confidential information.[22]

The percentage of victims who were former public defender clients, as shown in Table Two, varied from 6% in rape cases to 19% in homicide and exhibiting firearms cases.[23] Altogether, 14% of the victims in the

20. The distinction is reflected in the bar's ethical rules. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105(B) (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1983).

21. Interview with Bedford Douglass, Assistant Public Defender of Maricopa County (Apr. 28, 1977) (notes on file with author).

22. Homicide cases present an interesting issue, since the victim cannot testify against the defendant. Arguably, this circumstance gives counsel more leeway to use information from the former client's file for the benefit of the defendant. The victim can no longer be embarrassed by the information, which could conceivably be useful for the fact-finder on the issue of the defendant's guilt. However, the lawyer is violating the trust placed in him by the deceased client, and the victim's reputation could be harmed by the breach of trust. On balance, the death of the former client should not affect the lawyer's duty to preserve confidences and secrets.

23. Some qualifications should be noted concerning these data. The reported percentages represent those cases, and only those cases, in which the Public Defender Office was counsel of record at the time of the defendant's arraignment in the Superior Court. The percentages overstate the frequency with which the Public Defender actually cross-examined former clients at trial, because many prosecutions were terminated by plea agreement or dismissal before trial. During the year in which the study took place, 18% of the Public Defender's felony clients pleaded guilty to their original charges, 31% pleaded guilty to misdemeanor charges, and 27% pleaded guilty to fewer or lesser felony offenses than those originally charged. MARICOPA COUNTY PUBLIC DEFENDER, ANNUAL REPORT 1978-79, at 2.

TABLE TWO

VICTIM & WITNESS CHARACTERISTICS BY OFFENSE

	Homicide	Rape	Felonious Assault	Exhibiting Firearm	All Categories
Number of Cases	21	31	104	36	192
Number of Victims	21	31	112	43	207
Number of Victims Who Were Former Clients	4	2	15	8	29
Percentage of Victims Who Were Former Clients	19	6	13	19	14
Number of Other Civilian Witnesses	7	13	75	17	112
Number of Civilian Witnesses Who Were Former Clients	2	2	9	1	14
Percentage of Civilian Witnesses, Former Clients	29	15	12	6	13
Total Number Victims & Civilian Witnesses	28	44	187	60	319
Percentage of Victims & Civilian Witnesses Who Were Former Clients	21	9	13	15	13

Table One understates the extent to which the Public Defender Office confronted former clients in important pre-arraignment proceedings. Some cases are terminated by plea agreement or dismissal at the preliminary hearing stage and therefore do not proceed to an arraignment. Many plea agreements at the preliminary hearing stage result in reductions of charges to misdemeanor status. Interview with Bedford Douglass, Assistant Public Defender of Maricopa County (Apr. 28, 1977). If the victim has an arrest record, prosecutors are more likely to drop or reduce charges. *See* Williams, *The Effects of Victim Characteristics on the Disposition of Violent Crimes*, in CRIMINAL JUSTICE AND THE VICTIM 177, 181, 192 (W. McDonald ed. 1976).

Finally, the Public Defender Office sometimes withdrew from representing defendants upon discovering conflicts of interest impairing cross-examination at the preliminary hearing stage. Superior Court arraignment records in those cases would indicate a court-appointed private attorney as counsel for the defendant, even though the case was originally assigned to the public defender.

study were former clients of defense counsel. The percentages for non-victim prosecution witnesses were similar; 13% of these witnesses were former public defender clients. These figures demonstrate that the public defender office faced its own former clients as prospective prosecution witnesses in a substantial proportion of its cases. Although the experience of one defender agency cannot be regarded as representative of criminal lawyers in general, the office appears to be a typical urban defender agency handling a large number of cases.[24] If as many as 13.5% of the victims and other prospective government witnesses in prosecutions for violent felonies are former clients of defense counsel, there is a substantial risk that conflicts of interest occur frequently.

II. The Actual Practices of Criminal Defense Lawyers When Former Clients Testify for the Prosecution: A Survey

To evaluate the gravity of the risk of conflict of interest from successive representation, it is important to know the customs of defense counsel when the situation arises. Some practices may be followed to protect the current client's right to effective representation. For example, requesting the witness to consent to counsel's use of information obtained during the earlier representation focuses on the defendant's interest in a thorough cross-examination.[25] Other approaches, such as office policies that restrict access to the files of former clients, consider the witness's interest first. Indeed, an examination of public defender policies relating to the use of information in former clients' files demonstrates the confusion lawyers experience in successive representation situations.

The author conducted a survey of public defender agencies covering, among other issues, successive representation.[26] Respondents were asked how long they retained the files of former clients, whether those files were

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24. The Maricopa County Public Defender Office serves Phoenix and surrounding cities. At the time of the study, Phoenix was the thirteenth most populous city in the United States. U.S. Department of Commerce, Statistical Abstract of the United States: 1980, at 25 (1981). During the 1981-82 fiscal year, the Maricopa County Public Defender employed 72 lawyers and handled 64% of all felony cases filed in the county. Letter from Bedford Douglass, Assistant Public Defender of Maricopa County, to Gary Lowenthal (May 10, 1983) (on file with author). *Cf. supra* note 17 (percentage of cases handled by Alameda County Public Defender Office and Legal Aid Society of New York); *infra* note 27 (number of lawyers employed by public defender agencies participating in survey).

25. *See infra* pp. 49-51.

26. This survey, which took place in 1977, included questions about conflicts between former clients and current clients, situations in which prosecution witnesses are current clients of defense counsel, joint representation of co-defendants, policies regarding reporting conflicts of interest to the court, and criminal appeals raising the issue of ineffective assistance of trial counsel. An earlier article prepared by the author discussed the joint representation issues included in the survey. Lowenthal, *supra* note 9, at 950-58.

physically accessible to trial attorneys employed by their offices, whether respondents had rules restricting such access, and whether they had rules delineating the information in the files that could be used for purposes of cross-examination. Sixty-three defender offices, ranging in size from three to over seven hundred lawyers,[27] responded to the questionnaire, and personal interviews were conducted with over twenty individual public defenders in seven cities during a nineteen-month period.

A. *The Physical Accessibility of Former Clients' Files*

The office files of former clients normally must be retained by original defense counsel for a variety of reasons.[28] If those files are maintained in a readily accessible location, the confidences or secrets of a former client may potentially be used in a manner that is disadvantageous to the former client. This risk is particularly acute if the caseloads of staff attorneys are large, and resources for pre-trial investigations are scant.[29] When investigators are not available to interview witnesses and little time exists for investigation by staff lawyers themselves, the temptation is strong to walk across an office to look through a file that may contain a wealth of information for cross-examination. This temptation can be even stronger, as one survey respondent noted, when pre-trial discovery from the government is limited.[30]

The survey revealed that in most offices, former clients' files were readily available to staff attorneys. As shown in Table Three, the files of former defender clients were retained indefinitely by 77% of the offices responding to the survey, and were retained for at least 5 years by 93% of the respondents.[31] In addition, all sixty defender agencies reporting that

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27. The Legal Aid Society of New York, with a staff of 710 lawyers as of September 1977, was the largest agency to respond to the survey. Other responding offices with over 100 lawyers included the Commonwealth of Kentucky Office of the Public Defender (430 lawyers), the Los Angeles County Public Defender Office (388 lawyers), the New Jersey Office of the Public Defender (225 lawyers), and the Maryland Office of the Public Defender (115 lawyers). Ten other offices with over 30 staff lawyers also responded to the survey. Twenty-five responding agencies employed fewer than ten lawyers.

28. *See supra* note 7.

29. On the subject of the limited resources available to public defenders for fact investigation, see S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF *Argersinger v. Hamlin* 17–18, 182–83 (1976). *See also* Ligda, *Work Overload and Defender Burnout*, 35 N.L.A.D.A. BRIEFCASE 5 (1977) (effects of working environment on public defender performance).

30. Questionnaire response of Office of Public Defender, Essex Region, Newark, N.J. (1977) (on file with author) ("We have great difficulty obtaining discovery from the prosecutor's office. Therefore we use [former clients'] files for background on witnesses and for leads for investigation. We use our own [prior] work product or prior discovery."). The difficulties of obtaining pre-trial discovery from the government are discussed *supra* note 5 and *infra* pp. 43–44.

31. Table Three represents the responses to the following question: "How long do you keep the files of former clients after judicial proceedings have been concluded in their case?" A few respondents noted that they retain misdemeanor files for shorter periods than felony files; the period indicated for felony files was used in Table Three.

they retained former clients' files indicated that those files were maintained in locations that were physically accessible to their office staff.[32]

TABLE THREE

PERIOD IN WHICH CLIENT FILES ARE RETAINED AFTER THE CONCLUSION OF JUDICIAL PROCEEDINGS

Time File Retained	Number of Offices	Percentage of Offices
Indefinite period	47	77
More than 10 years	2	3
10 years	3	5
5 years	5	8
Less than 5 years	3	5
Do not retain file	1	2
Total	61	100

B. *Policies Restricting Access to Files*

The supervisors in some public defender agencies expressed concern over the ready availability of former clients' files. Although there was a consensus among persons interviewed that staff attorneys generally exercise sound judgment when reviewing the files of former clients, there also was a shared recognition that strong incentives tempt a lawyer to overlook a former client's confidentiality rights. First, a public defender's "won-lost record" may be the most important determinant of his professional status among peers. Second, in most cases the staff lawyer is not personally acquainted with the former client, and it is easier to identify with the interests of the current defendant. Finally, the lawyer may perceive the witness more as a member of the prosecution team than as a former client.

As a result, there is widespread suspicion among public defenders that some staff attorneys misuse confidential information, although the extent of the practice is unknown. One Chief Deputy stated this suspicion, only partially in jest, during an interview: "I don't know how often attorneys in our office look through old files for cross-examination leads, but we sure see a lot of lawyers on our felony trial staff spending time hanging around the file cabinets."[33] Another administrator, expressing similar con-

32. The questionnaire asked: "Are the files of former clients physically accessible to trial attorneys in your office?" No one responded that the files were inaccessible. However, the Public Defender of the State of Maryland reported that former client files were accessible only "under written request for access setting forth reason."

33. Interview with Bedford Douglass, Assistant Public Defender of Maricopa County (Apr. 18, 1977) (notes on file with author).

cern, indicated that when former clients were prosecution witnesses in particularly sensitive cases, he would personally lock the former clients' files in his desk drawer.[34]

Many of the agencies responding to the survey had policies restricting staff attorneys' access to or use of former clients' files. However, there was little uniformity in these rules, and some offices had no policies at all to cover successive representation problems. Table Four summarizes the approaches taken by survey respondents in restricting the use of former clients' files.[35]

TABLE FOUR

PUBLIC DEFENDER POLICIES ON USE OF FORMER CLIENT FILES FOR CROSS-EXAMINATION

Policy	Number of Offices	Percentage of Offices	
Will not represent defendant	13	21	36
No access permitted to former client's files	9	15	
Access and use with permission of supervisor	2	3	6
Access only by lawyer who represented former client	2	3	
Access and use permitted to all trial lawyers	36	58	58
Total	62	100	100

As seen in Table Four, thirteen offices, or 21% of the respondents, reported that they automatically sought permission of the court to withdraw from representing the current client whenever they were called upon to cross-examine a former client. This prophylactic approach not only eliminates the risk that confidential information will be misused, but also avoids even the appearance of impropriety occasioned by successive representation.[36] Most defender agencies, however, have not adopted the pro-

34. Interview with James C. Hooley, then Public Defender of Alameda County, California (Dec. 14, 1976) (notes on file with author).

35. Respondents were asked: "Does your defender organization have any rules regarding the circumstances in which attorneys handling the cases of current clients may or may not review the files of former clients to obtain investigation leads or information useful for cross-examination of the former client? If so, please explain."

36. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981) ("A Lawyer Should Avoid Even the Appearance of Professional Impropriety.").

phylactic approach because of its cost. Whenever a public defender office withdraws from representing a client, the court must appoint—and compensate—private counsel. If the public defender were to withdraw automatically each time a former client testified for the government, the public expense would be substantial.[37]

An additional nine offices (15% of the respondents) prohibited staff attorneys from looking into the files of former clients unless they were acting on behalf of the former clients themselves. This policy places the public defender staff attorney in the same situation as any other lawyer who would have to cross-examine the witness without the benefit of confidential information. It also eliminates the decision as to which information in a file is protected.[38]

Prohibiting lawyers from reviewing the files of former clients, however, creates two problems. First, without looking into the file of a former client who is scheduled to testify for the government, defense counsel may not be able to determine if it is appropriate to withdraw from the defendant's case, and as a result may continue to represent the defendant even when a conflict of interest exists. Second, a prohibition against entering the files of former clients is difficult to enforce. One staff attorney in an agency with a prohibition policy commented: "I like to refer to the office rule as the 'no peek' rule. But, you know, everyone peeks anyway, and there's no one to peek at the peekers."[39]

Altogether, 36% of the survey respondents either automatically withdrew from successive representation cases or prohibited staff lawyers from looking into files of former clients. The remaining respondents offered less protection to their former clients. A few permitted access and use of a former client's files only by the lawyer who previously represented the witness[40] or only after a supervising attorney had first reviewed the file to

37. Several defenders remarked that the expense to the public precluded their withdrawal from all cases in which there was a potential conflict with a former client. The survey response of the Trenton Office of the Public Defender is typical of these defenders: "The safer course might be to avoid all such conflicts. Unfortunately, after a period of time that would mean staying out of a very large number of cases. This is impossible." Questionnaire response of the Office of the Public Defender, Trenton, N.J. (1977) (on file with author). At least one defender was bitter over the constraints imposed by local budgets on withdrawals for conflicts: "The private bar breaches the professional codes because they hate to give up a fee, [and] we keep cases to save the state's money. I feel the situation is a disgrace to the legal profession." Questionnaire response of the Public Defender, New Haven County, Connecticut (1977) (on file with author). The New Haven defender's comment regarding the private bar is beyond the purview of this article; on the issue of economic incentives for private lawyers to ignore conflicts of interest, see Lowenthal, *supra* note 9, at 961-63.

38. *See infra* pp. 16-17.

39. Interview with Howard Harpham, Assistant Public Defender, Alameda County, California (Dec. 15, 1976) (notes on file with author).

40. Two defender organizations reported that the file of a former client is accessible only to the individual lawyer who represented that client. One of those organizations, the Office of Public Defender of Kentucky, is a "loose confederation" of 430 individual attorneys. The deputy defender preparing the survey response commented that attorneys are likely to protect their own former clients:

remove confidential information.[41] However, thirty-six defender agencies (58%) reported that staff lawyers in their offices were permitted to look into former clients' files and to use some or all of the information there for cross-examination.

C. *Restrictions on Using Information Found in Files*

The thirty-six defender offices which permitted staff attorneys access to former clients' files for cross-examination leads followed divergent approaches in deciding which information in those files could be used.[42] For instance, seventeen offices distinguished between privileged information obtained from attorney-client communications and all other information in the former client's file. This approach preserves the integrity of all communications made by the former client to the attorney, but permits counsel to use information contained in old police reports, probation reports, and other items. Other defenders objected to this practice, however, because the police reports and probation reports in question came into the defenders' possession as a result of the trust reposed in them by former clients. Using those reports in cross-examination was viewed by many offices as a breach of that trust.[43]

Twenty-one of the thirty-six offices sought to distinguish "confidential" from "public" information, allowing attorneys to use only that information in the files of former clients that could have been obtained from other sources.[44] This approach permits lawyers to obtain information promptly

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"Obviously, an attorney aware of a possible conflict would not permit another attorney to look at his files." Questionnaire response of the Office of the Public Defenser of the Commonwealth of Kentucky (1977) (on file with author).

A second agency reported a similar but more formal approach: "Office policy does not allow access to files of former clients other than by the attorney who represented that client, or by a successor attorney acting in behalf of former client." Questionnaire response of the Public Defender Service for the District of Columbia (1977) (on file with author).

41. The offices reporting that they followed this policy were those of Monterey County, California and Franklin County, Ohio.

42. Respondents were asked in the questionnaire:

> If attorneys in your organization are permitted to look into the files of former clients, are they permitted to use information from those files in representing current clients, so long as the information in question could also have been obtained from other sources? Do you distinguish between information that was obtained as part of a privileged client-attorney communication and all other information in the former client's file?

43. The practice of distinguishing between privileged communications and all other information in a former client's file also may violate DR 4-101 of the *Model Code*. *See Model Code of Professional Responsibility* DR 4-101; *infra* pp. 20–21.

44. The twenty-one agencies include some of the seventeen public defender offices that indicated that they distinguish between confidences and other information in a former client's file.

Typical is the policy statement of the Public Defender in Monterey County, California: "A potential conflict of interest arises when a crime victim or a prosecution witness has in the past been represented by the office and his case file has useful information of a confidential nature as opposed to a matter of a public nature." MONTEREY COUNTY PUBLIC DEFENDER PROCEDURES MANUAL § 315 B.2 (1977). A similar rule was followed by the Maricopa County Public Defender, the office dis-

when discovery procedures or independent investigation to acquire the same information would be time-consuming or costly. It also preserves all private information concerning the former client, not just information that is protected by the attorney-client evidentiary privilege. However, the public-private distinction ignores the possibility that counsel might not even be aware of the existence of much "public" information if it were not included in the former client's file.[45]

Nine other offices reported that they did not formally distinguish between different types of information in a former client's file, but instead left it to the discretion of the individual staff attorney or a supervising attorney to determine whether to remain in a case and which information to use in preparing cross-examination.[46] This approach recognizes that the circumstances of each case will determine the strength of the clients' respective interests. One problem with a case-by-case approach, however, is that two lawyers in the same office might handle identical situations differently. Moreover, the judgment of the individual staff attorney may be colored by the strength of the prosecution's case. There is a natural tendency among trial lawyers to want to try a "winning case" and to avoid taking a "loser" to trial. If the questionable information in a former client's file has a bearing on the former client's credibility as a witness and the defendant has a strong chance for acquittal, the incentive is strong for the individual trial lawyer to minimize the seriousness of the potential conflict. Conversely, in a case in which the defendant's chance for an acquittal is virtually non-existent but the defendant desires to proceed to trial, counsel may be particularly alert to even a remote possibility of conflicting interest which would enable him to withdraw from the case.[47]

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cussed in the study reported *supra* pp. 7–11. Interview with Bedford Douglass, Assistant Public Defender of Maricopa County (Apr. 28, 1977) (notes on file with author).

45. Several defenders commented that the public-private distinction, like the distinction between privileged communications and all other information in a file, violated the former client's trust. Much of the problem stems from lawyers' disagreement on what is "public" information. Some respondents in the survey would permit the use of information in a former client's file if that information could have been obtained from a "public" record, even though it is extremely unlikely that the lawyer would have uncovered the information in the absence of the prior representation. Other offices reported that they distinguished between information that was generally known or easily obtainable from other sources and information that was contained in less accessible "public" records.

46. The following statement was typical for offices in this category: "The attorney assigned the case of the current client makes his own conflict determination. Supervisors review the decision, but *rarely* overrule." Questionnaire response of the Sacramento County Public Defender (1977) (emphasis in original) (on file with author).

47. This phenomenon was noted by several defenders who were interviewed by the author, particularly Patrick Murphy, Public Defender for Contra Costa County, Cal. Interview with Patrick Murphy, Public Defender for Costa County, Cal. (Dec. 15, 1976) (notes on file with author).

In addition, one public defender office defined its loyalty almost exclusively in terms of its current client:

> As long as the former client's case has been disposed of, and as long as the new information would not incriminate him or her in any new crimes, I see no reason why information from

In general, the survey responses demonstrate that public defenders follow a remarkable variety of practices when former clients are called as prosecution witnesses. Defenders disagree about the circumstances in which it is permissible to cross-examine a former client, and also disagree about which information in a former client's file may be used to prepare cross-examination. This disagreement reflects the uncertain guidance provided by the *Model Code of Professional Responsibility*, which completely ignores the problems of successive representation. The following Section compares the *Model Code* with the proposed *Model Rules of Professional Conduct*, and suggests a framework for providing more direction to criminal practitioners.

III. Successive Representation and the Bar's Ethical Rules

A. *The* Model Code of Professional Responsibility

The successive representation of clients with potentially conflicting interests is not treated explicitly by the *Model Code*. The *Model Code* provides no guidance to attorneys concerning the propriety of representing a client when a former client is either an adverse party or witness.[48] Canon 5, which purports to deal with recurring conflict of interest problems, focuses on such matters as the simultaneous representation of adverse interests,[49] conflict between a lawyer's own economic or personal interests and those of a client,[50] circumstances in which a lawyer may be called as a witness in a client's case,[51] and problems that may result when a person other than a client compensates counsel.[52] None of the Ethical Considerations or Disciplinary Rules associated with Canon 5 refer even indirectly to successive representation.[53]

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his file should not be used . . . for a second client at a later time. . . . Information relevant to impeachment of the former client acting as a State's witness can be most helpful.

Questionnaire response of the Racine County, Wis., Public Defender Office (1977). Although this policy appears to be insensitive to the confidentiality interest of a former client, it goes further than all other office policies in assuring that the defendant receives competent and zealous representation. However, the survey data indicate that this approach is viewed by many defenders as unacceptable because it violates the trust that former clients have reposed in their counsel.

48. DR 5-105(A) and (B) require lawyers to decline or discontinue the representation of a client if counsel's independent professional judgment on behalf of the client is likely to be adversely affected by the representation of another client. Although these provisions can be interpreted to apply to successive representation, a close reading of the two provisions clearly shows that they were intended to refer to the *simultaneous* representation of potentially conflicting interests. Model Code of Professional Responsibility DR 5-105(A), DR 5-105(B) (1981).

49. *See id.* DR 5-105, DR 5-106, EC 5-14, EC 5-15, EC 5-16, EC 5-17, EC 5-19.

50. *See id.* DR 5-101(A), DR 5-103, DR 5-104, EC 5-2, EC 5-3, EC 5-4, EC 5-5, EC 5-6, EC 5-7, EC 5-8, EC 5-11, EC 5-13.

51. *See id.* DR 5-101(B), DR 5-102, EC 5-9, EC 5-10.

52. *See id.* DR 5-107, EC 5-22, EC 5-23.

53. The closest Canon 5 comes to discussing successive representation is EC 5-20, which addresses the question of a lawyer serving as an arbitrator or a mediator in a matter which involves either present or former clients. *Id.* EC 5-20.

Instead, when a lawyer represents a party in litigation and a former client is either an adverse party or a witness in the same case, separate provisions of the *Model Code* explain the duties owed to each client. Canons 6 and 7 exhort the lawyer to represent the current client competently and zealously,[54] while Canon 4 defines counsel's continuing duty to preserve the confidential information of the former client.[55] The relationship between Canon 4 and Canons 6 and 7 is ambiguous, and none of the Ethical Considerations or Disciplinary Rules associated with any of these Canons refer to the competing duties owed to former and present clients.

1. *Duties Owed to the Current Client*

The ethical obligation to represent a client competently includes a duty to conduct factual investigations in preparing a client's case.[56] Although DR 6-101(A)(2) of the *Model Code* states this duty in such vague and general terms that its scope is impossible to discern,[57] the *ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function* includes a more precise statement of the criminal lawyer's investigatory obligation, with a requirement that counsel's "prompt" investigation should "explore all avenues leading to facts relevant to guilt . . . or penalty."[58] Taken literally, this duty would *require* counsel to review the office files of a former client testifying for the prosecution, to uncover leads for cross-examination.

The investigatory duty owed to the current client is buttressed by Canon 7's vague exhortation to represent a client "Zealously Within the Bounds of the Law."[59] The drafters of the *Model Code* intentionally left

54. "A Lawyer Should Represent a Client Competently." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 6 (1981). "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." *Id.* Canon 7.

55. "A Lawyer Should Preserve the Confidences and Secrets of a Client." *Id.* Canon 4.

56. *Id.* DR 6-101(A)(2), EC 6-4.

57. DR 6-101(A)(2) states that a lawyer shall not "[h]andle a legal matter without preparation adequate in the circumstances." *Id.* DR 6-101(A)(2).

58. ABA STANDARDS, *supra* note 9, at Standard 4.1. The Commentary to Standard 4.1 includes the following:

> The relationship of effective investigation by the lawyer to competent representation at trial is patent, for without adequate investigation he is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. *He needs to know as much as possible about the character and background of witnesses to take advantage of impeachment* . . . .

Id. Commentary to 4.1 (emphasis added).

59. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981). The meaning of "zealous" representation is clarified for criminal lawyers by the *ABA Standards Relating to the Defense Function*. According to the *ABA Standards*, the "primary role" of criminal defense counsel, more so than for other lawyers, is to serve as the client's "champion." ABA STANDARDS, *supra* note 9, at 145-46 introduction. Because of the unique disadvantages of the criminal defendant in the adversary system, the *ABA Standards* admonish criminal lawyers that they "cannot be timorous" in protecting the rights of an accused. *Id.* at 146 introduction.

the scope of this duty vague because "[t]he bounds of the law in a given case are often difficult to ascertain."[60] Therefore, one provision in DR 7-101 permits counsel to "exercise his professional judgment to waive or fail to assert a right or position of his client,"[61] even though another portion of the same Disciplinary Rule requires counsel to "seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . ."[62] The application of these arguably contradictory provisions to the cross-examination of former clients is anything but clear. Nevertheless, when considered with the criminal lawyer's investigatory obligation, the duty of zealous representation on behalf of a criminal defendant can be read by the practitioner as a broad mandate to uncover defense evidence aggressively, putting the defendant's interests ahead of those of a former client.

2. *Duties Owed to the Former Client*

On the surface, the duties owed to the former client under the *Model Code* seem clear. DR 4-101 protects not only a client's confidences, but also his "secrets," or "other information gained in the professional relationship . . . the disclosure of which would . . . be likely to be detrimental to the client."[63] The duty to preserve secrets exists "without regard to the nature or source of information or the fact that others share the knowledge."[64] Therefore, it presumably includes such matters as police reports, arrest records, psychiatric information, and probation reports.[65] Since the duty to preserve a client's confidential information "continues after the termination" of a formal lawyer-client relationship,[66] application of Canon 4 to the information contained in the file of a criminal lawyer's former client appears clear. Defender offices that distinguish between a former client's confidential communications and other information in the client's file may thus be violating the *Model Code.*

There is, however, a qualification to Canon 4's confidentiality requirement. DR 4-101(C)(2) permits the disclosure of a client's confidences or

60. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-2 (1981).

61. *Id.* DR 7-101(B)(1).

62. *Id.* DR 7-101(A)(1).

63. *Id.* DR 4-101(A).

64. *Id.* EC 4-4 (covering any information "acquired in the course of the representation").

65. *Cf. id.* EC 4-5 (condemning use of such information to client's disadvantage).

66. *Id.* EC 4-6.

secrets "when permitted under Disciplinary Rules or required by law or court order."[67] Whether this may fairly be read to include the Disciplinary Rules associated with Canons 6 and 7, the ABA's *Standards Relating to the Defense Function*, and the Sixth Amendment's requirement of effective assistance of counsel, is unclear.[68] The *Code*'s application to successive representation in criminal cases is confusing; it is not surprising that public defenders take diverse approaches when former clients testify for the government.

B. *The* Model Rules of Professional Conduct

The *Model Code* has failed both to determine when it is inappropriate to oppose a former client in litigation, and to indicate which information, if any, in a former client's file may be used to further the representation of a current client. Each of these shortcomings is addressed explicitly in the *Model Rules of Professional Conduct.* Rule 1.9(a) prohibits a lawyer from representing a client against a former client under certain circumstances, and Rule 1.9(b) extends Canon 4's protection of a client's confidential information to the specific circumstances of successive representation.[69] Together, these provisions address several of the problems that have plagued practitioners under the *Model Code of Professional Responsibility.*

Rule 1.9(a) prohibits successive representation if the current client's interests are "materially adverse" to the interests of the former client and the two matters of client representation are the same or are "substantially related."[70] This rule is essentially a restatement of the standard followed by most courts when one party in a civil action moves to disqualify its former counsel from representing an adverse party.[71] Adoption of the civil litigation disqualification rule for criminal representation is a laudable addition to the bar's official ethical standards. Since the rule does not require withdrawal from a case every time a former client is a prosecution witness, it would not result in unnecessary public expense for indigent defense representation. The rule might also lessen criminal lawyers' use of

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67. *Id.* DR 4-101(C)(2).

68. A similar ambiguity occurs in Canon 7. DR 7-101(A), defining a lawyer's responsibility to represent a client zealously, states that a lawyer shall not intentionally "[f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . ." *Id.* DR 7-101(A). It is not clear whether use of a former client's closed file for investigation leads is a "means permitted by . . . the Disciplinary Rules," when this provision is compared with DR 4-101(B)(2).

69. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983).

70. The text of Rule 1.9(a) states that a lawyer shall not "represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation." *Id.* Rule 1.9(a).

71. The disqualification rule followed in civil litigation is discussed at length *infra* pp. 28-31.

former clients' confidential information against those clients in cross-examination; arguably, when a former client's file contains information useful for cross-examination, the former client's case is "substantially related" to the defendant's case.

However, two problems in the present wording of Rule 1.9(a) could limit its applicability in criminal cases or confuse lawyers trying to follow it. First, the rule applies only when the respective interests of the former and current clients are "materially adverse." In civil litigation, the courts have used the adversity requirement to deny disqualification when the movant is a co-plaintiff or co-defendant.[72] It is by no means clear from proposed Rule 1.9(a) whether the interests of a *witness*, rather than an opposing party, are sufficiently adverse to those of a criminal defendant to invoke the prohibition.[73] This ambiguity should be eliminated to protect a witness's interest in criminal cases.

Second, the *Model Rules* provide no guidance in determining if two matters of client representation are "substantially related." The drafters' reluctance to define this term is understandable, since the courts have failed to agree on a definition for over thirty years.[74] Nevertheless, a prohibition against unethical conduct should specify that conduct in unequivocal terms. A former client's case that was based in part on the same events or transactions as the defendant's case would appear to be "substantially related."[75] In other circumstances, however, the extent and importance of the relationship are less clear. Some guidance on these questions, at least in the Official Comment to Rule 1.9(a), would be invaluable.[76]

Rule 1.9(b) resolves the conflicting obligations under Canons 4, 6, and 7 of the *Model Code of Professional Responsibility* in favor of the former client's confidentiality interest. It states that a lawyer may not ordinarily use information "relating to" the representation of a former client to the "disadvantage" of the former client.[77] The broad inclusion of all informa-

72. For an analysis of the adversity requirement, see *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1323-25 (1981) [hereinafter cited as *Developments*].

73. The Comment to Rule 1.9 refers to Rule 1.7 to determine whether the interests of the present and former clients are adverse. Although Rule 1.7 itself does not address this issue, the Comment to that rule makes clear that the term "adverse" in the context of litigation refers to an opposing party. Nothing in Rules 1.7 or 1.9 indicates whether the interests of a *witness* are sufficiently adverse to invoke the prohibition.

74. *See infra* pp. 30-31.

75. *See infra* p. 30.

76. *See infra* pp. 30-31.

77. The text of Rule 1.9(b) states that a lawyer shall not "use information relating to the representation to the disadvantage of the former client except as Rule 1.6 would permit with respect to a client or when the information has become generally known." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1983).

tion "relating to" the former client's case protects not only confidential communications from the former client, but also information contained in such items as police reports and probation reports. A lawyer's use of a former client's protected information when cross-examining the former client is probably to the "disadvantage" of the former client, but any ambiguity should be eliminated from the proposed rule.[78]

An explicitly stated exception to Rule 1.9(b) occurs when "the information has become generally known."[79] This exception supports the distinction made by some public defenders between private information and other, "generally known" information that could easily be obtained from other sources.[80] The requirement of general availability protects the former client from the lawyer's use of information which could have been obtained from outside sources but which the lawyer could not reasonably have been expected to discover in the absence of the prior representation.[81]

These problems with the wording of the *Model Rules* can easily be overcome by minor redrafting. In general, the *Model Rules* significantly improve upon the approach of the *Model Code of Professional Responsibility*, both by recognizing the potential for conflict of interest in successive representation and by delineating basic rules that address the most substantial practical problems occurring in criminal cases. But the courts too must come to grips with the problems of successive representation by criminal defense lawyers.

IV. The Case Law of Successive Representation

The issue of whether a criminal defense lawyer may oppose a former client in a particular case has been raised in three procedural contexts: (1) in post-conviction proceedings when a defendant seeks to overturn his conviction on the ground that defense counsel's divided loyalty violated his Sixth Amendment right to the effective assistance of counsel; (2) at trial, when the defense lawyer moves to withdraw from the case, rather than cross-examine the former client; and (3) at trial, when the prosecution seeks to disqualify the defense lawyer in much the same manner that civil litigants sometimes seek to disqualify their former counsel from representing adversaries. Since the manner and context in which the issue is raised

78. The same problem exists in the wording of Model Code of Professional Responsibility DR 4-101(B)(2).

79. Model Rules of Professional Conduct Rule 1.9(b) (1983).

80. *See supra* p. 17.

81. Rule 1.9(b) also permits the use of confidential information against the former client in circumstances covered by Rule 1.6. The final form of the *Model Rules* restricts the scope of Rule 1.6 to circumstances in which the lawyer's disclosure of confidential information will either prevent the commission of a serious violent crime, or establish a claim or defense on the lawyer's own part. Model Rules of Professional Conduct Rule 1.6(b) (1983).

affect its resolution in both trial courts and appellate courts, it is necessary to analyze each procedural context separately.

A. *No Motion to Withdraw or Disqualify is Made in the Trial Court*

> A criminal defense lawyer represents Tom on a charge of possessing narcotics. Tom enters a guilty plea as part of a negotiated plea bargain with the government. The prosecution recommends probation for Tom in return for Tom's cooperation in the apprehension of other persons engaged in narcotics traffic. Tom is granted probation by the court and later identifies Mary as a seller of narcotics. Subsequently, Mary is charged with distributing narcotics, and Mary retains the lawyer who previously represented Tom. At Mary's trial, Tom is called as a government witness. No one brings the lawyer's prior representation of Tom to the attention of the trial court. Mary is convicted and later seeks to overturn her conviction on the ground that she has been denied the effective assistance of counsel.

Mary's case presents two issues. First, why should Mary be permitted to challenge her conviction when she failed to raise the conflict of interest claim in the trial court? Second, what standard of review should the court apply on appeal? This section examines the current law associated with each of these issues and suggests an alternative approach.

1. *Current Law*

A defendant's timely objection to successive representation is not a prerequisite for post-conviction relief.[82] In the illustration, Mary might not even learn that Tom was her attorney's former client until after she has been convicted. Criminal defense counsel may fail to disclose an earlier representation for several reasons. Sometimes the lawyer has a pecuniary interest in remaining in the case, and as a result may overlook or ignore a potential conflict of interest involving a former client.[83] In other cases, the lawyer may simply conclude erroneously that he will not have to cross-examine the witness on the subject of the prior representation, or that the

82. The contemporaneous objection rule of most jurisdictions requires the defendant under normal circumstances to afford the trial court a timely opportunity to cure a procedural error before permitting the defendant to raise the issue on appeal. *See, e.g.*, People v. Constant, 645 P.2d 843, 847 (Colo. 1982); State v. Lang, 46 N.C. App. 138, 146–47, 264 S.E.2d 821, 827 (1980); State v. Weygandt, 20 Wash. App. 599, 605, 581 P.2d 1376, 1379 (1978). In addition, federal habeas corpus review usually is not available to a defendant who defaults in raising a constitutional issue in the state courts. *See* Wainwright v. Sykes, 433 U.S. 72, 82–83 (1977). These rules have never been invoked by the courts in successive representation cases.

83. *See* Lowenthal, *supra* note 9, at 961–63 (1978) (economic pressures on privately retained lawyers causing them to overlook conflict of interests).

problem can be overcome by adequate representation of the defendant in all other respects.[84]

Even when a defendant in Mary's circumstances is aware before trial of the prior representation, she may not appreciate the risk that a conflict of interest will occur. Unless advised by counsel, the current client probably will not realize that the lawyer may avoid certain issues when cross-examining the witness. The defendant also may hesitate to object to the lawyer's continued participation in the case because of the formidable expense and anxiety associated with obtaining new counsel.[85] Accordingly, the courts have not applied a contemporaneous objection rule in successive representation cases.[86] Although a few decisions have cited the defendant's failure to object as one of several reasons for not reversing, in each case there was evidence that the defendant was aware of the prior representation when he retained counsel and in fact sought to obtain an advantage by retaining a lawyer familiar with a key prosecution witness.[87]

Even though there are sound justifications for permitting a defendant to raise the conflict of interest issue for the first time in post-conviction proceedings, this exception to the contemporaneous objection rule creates substantial problems for reviewing courts. First, since the issue can be preserved without being brought to the attention of the trial court, there is a risk that an imaginative defendant—or defense counsel—can manipulate the situation to create a basis for appeal. A defendant might retain a particular lawyer, or choose to continue to be represented by a lawyer, specif-

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84. *See* United States v. Alberti, 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973). The *Alberti* case is discussed extensively *infra* pp. 31–34.

85. Since criminal defense lawyers normally require all or most of their fees to be paid in advance, the initial outlay for new counsel would be a burden for many defendants. The discharged lawyer would retain a portion (and in some cases a substantial portion) of the fee already paid, as compensation for time already spent on the case. The new lawyer would have to familiarize himself with the case and repeat much of the pre-trial preparation already completed by the first defense counsel. This "double fee" would probably be absorbed by the defendant in most cases. Even when the defendant is indigent, obtaining new court-appointed counsel involves terminating one professional relationship and having to develop trust and rapport in the new relationship. I make the assumption in the text that such a transition includes "psychological costs" for many criminal defendants. For a discussion of related problems, see Lowenthal, *supra* note 9, at 958–61.

86. The Supreme Court has not ruled on this issue. However, in Cuyler v. Sullivan, 446 U.S. 335 (1980), a joint representation case in which the defendant raised no conflict-of-interest objection in the trial court, the Court held that a criminal defendant would be entitled to a new trial if he could demonstrate to a reviewing court that a conflict had impaired the performance of his trial lawyer.

87. *See* United States v. James, 505 F.2d 898, 900 (5th Cir. 1975); Olshen v. McMann, 378 F.2d 993, 994 (2d Cir. 1967); Taylor v. United States, 126 F. Supp. 764, 765 (D. D.C. 1954), *rev'd on other grounds*, 226 F.2d 337 (D.C. Cir. 1955); Commonwealth v. Biancone, 260 Pa. Super. 197, 200, 393 A.2d 1221, 1223 (1978). In People v. Hallett, 71 A.D.2d 815, 817, 419 N.Y.S.2d 397, 400 (1979), the trial judge asked the defense if there was a conflict of interest. The defendant remained silent, but counsel stated that his client "waived" any conflict. Over a strongly worded dissent, the appellate court upheld the "waiver." For a discussion of what constitutes a valid waiver of effective representation, see *infra* pp. 58–61. In view of a recent Second Circuit case on this issue, *see* United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), it is doubtful that *Hallett* is good law.

ically because the lawyer previously represented a government witness in the defendant's case.[88] The defendant can then attack his conviction on the ground that counsel's obligation to preserve the witness's confidences denied him the effective assistance of counsel. Similarly, a lawyer might fail to disclose to the trial court his prior representation of a prosecution witness in order to give the defendant an opportunity for a second trial at little cost.[89]

Second, it is extremely difficult in post-conviction proceedings to ascertain whether a conflict in the obligations of defense counsel actually impaired a lawyer's representation. A former professional relationship may have no bearing on the conduct of cross-examination.[90] Moreover, when a conflict of interest does exist, the lawyer may decide to forego protection of the witness's interest and vigorously cross-examine the witness, even though such cross-examination may involve the disclosure of confidential information.[91]

For all these reasons, appellate courts consistently have required the defendant to shoulder a heavy burden in post-conviction proceedings to obtain a new trial when the alleged conflict was not brought to the attention of the original trial court. Before the Supreme Court's 1980 decision in *Cuyler v. Sullivan*,[92] most courts formulated this burden by requiring the defendant to demonstrate "some specific instance of prejudice, some real conflict of interest"[93] actually inhibiting counsel's cross-examination. This test required both specification of the protected confidential information and a showing of prejudice.[94] *Cuyler*, however, has modified the test.

Cuyler involved the joint representation of co-defendants by privately

88. *See* Taylor v. United States, 126 F. Supp. 764, 765 (D.D.C. 1954), *rev'd on other grounds*, 226 F.2d 337 (D.C. Cir. 1955).

89. In an analogous context, involving a failure by defense counsel to move for the suppression of evidence before trial, Justice Rehnquist reasoned: "Strong tactical considerations [by defense counsel] would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." Davis v. United States, 411 U.S. 233, 241 (1973).

90. When defense counsel's prior representation of a prosecution witness concerned a matter totally unrelated to the defendant's case, the courts routinely find that no debilitating conflict of interest existed. *See, e.g.*, Bryan v. United States, 645 F.2d 842, 843 (9th Cir. 1981); Bynum v. United States, 422 F. Supp. 1153, 1154 (S.D.N.Y. 1976); People v. Frisbie, 70 A.D.2d 1053, 1054, 417 N.Y.S.2d 551, 552 (1979).

91. Reviewing courts sometimes remark that the defendant actually benefited from counsel's familiarity with a prosecution witness he formerly represented. *See* Harrison v. United States, 387 F.2d 614, 615 (5th Cir. 1968).

92. 446 U.S. 335 (1980).

93. United States v. Lovano, 420 F.2d 769, 773 (2d Cir. 1970). As late as 1979, courts still required a showing of prejudice as a requisite for reversing the defendant's conviction. *See* Crisp v. State, 394 N.E.2d 115 (Ind. 1979).

94. *See* Olshen v. McMann, 378 F.2d 993 (2d Cir. 1967) (articulating the rationale for the defendant's required showing).

retained counsel.[95] The trial judge neither admonished the defendants of the risks of joint representation nor assessed the possibility that a conflict of interest would develop. Neither the defendants nor their counsel objected to the joint representation in the trial court. The Supreme Court held that the Sixth Amendment right to effective representation applied equally to privately retained and state appointed counsel,[96] but that the Constitution did not require the court to initiate inquiries into the propriety of joint representation.[97] In addition, the Court concluded that when the defense fails to object to a possible conflict of interest in the trial court, the convicted defendant seeking a new trial must demonstrate "that an actual conflict of interest adversely affected his lawyer's performance."[98] If such a showing is made, however, the defendant "need not demonstrate prejudice in order to obtain relief."[99]

Although *Cuyler* involved joint representation, lower courts have applied its holdings in successive representation cases.[100] These courts have interpreted *Cuyler* to require the defendant to demonstrate that trial counsel chose to protect the witness by avoiding specific issues on cross-examination, and that questioning the witness on those issues would have been favorable to the defendant's case, regardless of whether the additional questioning would have affected the outcome of the trial.[101]

Even without a more rigorous prejudice requirement, this showing is not easily or often made. Justice Marshall commented in his separate opinion in *Cuyler* that requiring a defendant "to demonstrate that his attorney's trial performance differed from what it would have been if the defendant had been the attorney's only client . . . is not only unduly harsh, but incurably speculative as well."[102] The convicted defendant may

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95. Two defense lawyers represented three defendants in separate murder trials in *Cuyler*. The Pennsylvania Supreme Court concluded that this did not constitute multiple representation. Commonwealth v. Sullivan, 472 Pa. 129, 161, 371 A.2d 468, 483 (1977). The Court of Appeals for the Third Circuit disagreed, holding as a matter of law that defense counsel engaged in joint representation. United States *ex rel.* Sullivan v. Cuyler, 593 F.2d 512, 519 (3d Cir. 1979). The Supreme Court upheld the Third Circuit on this point. Cuyler v. Sullivan, 446 U.S. at 342.

96. 446 U.S. at 344–45. Several lower courts previously distinguished between privately retained counsel and public defenders or court-appointed lawyers for Sixth Amendment purposes. *See* Olshen v. McMann, 378 F.2d 993, 995 n.2 (2d. Cir. 1967). *See generally* Lowenthal, *supra* note 9, 965–68 (criticizing decisions that distinguished between privately retained and court appointed counsel).

97. 446 U.S. at 346–48.

98. *Id.* at 348.

99. *Id.* at 349–50.

100. *See* United States v. Camiel, 519 F. Supp. 1248, 1251 (E.D. Pa. 1981).

101. Those courts that previously required the aggrieved defendant to demonstrate prejudice no longer do so. *See* Brown v. United States, 665 F.2d 271, 272 (9th Cir. 1982). Some courts, however, still require a post-conviction inquiry to determine "whether the appellant's attorney refrained from a more vigorous cross-examination of the [witness] because of his divided loyalties, and, if so, whether the appellant's representation would have benefited even marginally from a more aggressive cross-examination." *Id.* at 273 (Tang, J., concurring).

102. 446 U. S. at 355 (Marshall, J., concurring in part and dissenting in part).

not be aware of the areas of cross-examination that the lawyer skirted because of the prior lawyer-client relationship. Moreover, the attorney himself, when questioned in a post-conviction hearing, may not fully disclose the subtle pressures that might have constrained cross-examination.

The *Cuyler* approach also necessitates an inquiry into the very confidential information that the attorney has sought to protect. In order to determine whether the lawyer refrained from certain areas of cross-examination and whether the defendant would have benefited from a more thorough cross, the reviewing court must have a basic understanding of the nature of the information that could have been developed by counsel. Therefore, if the defendant can meet the "unduly harsh" *Cuyler* burden, the witness's confidentiality interest may be compromised.

Because of the problems under *Cuyler* in successive representation cases, the courts should consider alternative approaches. It would, for example, be instructive to contrast the Sixth Amendment decisions with civil disqualification cases involving former clients. Both lines of decision examine counsel's use of a former client's confidential information when representing a current client with differing interests. The two situations are markedly different in at least one respect: In the civil disqualification cases the former client seeks prospective relief to prevent the misuse of confidential information, while in the criminal cases the current client seeks remedial relief for counsel's failure to use the information in question. Nevertheless, counsel's competing professional obligations are the same in each situation. The lawyer in both cases may be compelled to choose between divulging secrets of the former client and foregoing zealous representation of the current client. Despite the similarity, courts have approached the two kinds of cases quite differently.

2. *The Civil Disqualification Standard*

The legal standard for disqualification of lawyers in civil cases, currently followed in virtually all American jurisdictions,[103] was articulated in *T.C. Theatre Corporation v. Warner Brothers Pictures*.[104] The "sub-

103. *See, e.g.*, Cossette v. Country Style Donuts, Inc., 647 F.2d 526, 529-36 (5th Cir. 1981); Cheng v. GAF Corp., 631 F.2d 1052, 1055-56 (2d Cir. 1980); Trone v. Smith, 621 F.2d 994, 998 (9th Cir. 1980); National Texture Corp. v. Hymes, 282 N.W.2d 890, 894 (1979); Reardon v. Marlayne, Inc., 83 N.J. 460, 472, 416 A.2d 852, 858-59 (1980).

Rule 1.9 of the MODEL RULES OF PROFESSIONAL CONDUCT incorporates the "substantial relationship" standard to determine when a lawyer may ethically oppose a former client in litigation. *See supra* pp. 21-22.

104. 113 F. Supp. 265 (S.D.N.Y. 1953). After the conclusion of a public antitrust action against Universal Pictures and several other major distributors of motion pictures, Universal's former lawyer brought a suit by T.C. Theatre against Universal and the other defendants named in the antitrust case, alleging the same conspiracy to restrain trade that had been litigated in the earlier action. Universal moved to disqualify the attorney from representing the plaintiff.

stantial relationship" test of *T.C. Theatre* requires three elements: (1) former representation of a party to the present action;[105] (2) present representation of a party whose interest is adverse to the former client's interest;[106] and (3) a substantial relationship between the former representation and any of the issues in the present action.[107] The party seeking disqualification need not prove that any actual confidences were reposed in its former lawyer; the court will "assume" that confidential information was passed to counsel if there is a "substantial relationship" between the two cases.[108] A disqualification ruling, therefore, is not a determination that a lawyer's actual behavior has jeopardized one client's interests to benefit another's. Rather, it is a prophylactic standard which seeks to avoid the lawyer's having to choose between competing obligations, and which recognizes that one client's interest may subtly color the attorney's judgment in serving the interest of the other.[109]

The civil disqualification rule is based on several considerations related to the "enormous pragmatic obstacles to any inquiry into the attorney's actual knowledge and conduct."[110] First, it would often be extremely difficult for the former client to prove that counsel actually received and used (or was prepared to use) confidential information of value in the current litigation.[111] Second, disqualifying counsel when the prior representation is substantially related to the current lawsuit avoids the appearance of impropriety, furthering an important policy of the bar's self-regulatory rules.[112] Third, as the *T.C. Theatre* opinion recognized, the introduction

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The court granted the motion to protect Universal from the disclosure or misuse of client confidences entrusted to the lawyer in the earlier case. According to the court, "where any substantial relationship can be shown between the subject matter of a former representation and that of a subsequent adverse representation, the latter will be prohibited." *Id.* at 268 (footnote omitted).

105. *See* Arkansas v. Dean Foods Prods., 605 F.2d 380, 383-84 (8th Cir. 1979); Novo Terapeutisk Laboratorium v. Baxter Travenol Laboratories, 607 F.2d 186, 191-92 (7th Cir. 1979).

106. For an analysis of the adversity requirement, see *Developments, supra* note 72, at 1324-25.

107. On the meaning of "substantial relationship," see *infra* pp. 30-31.

108. T.C. Theatre Corp. v. Warner Brothers Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953).

109. *See Developments, supra* note 72, at 1318. Judge Weinfeld in *T.C. Theatre* described the subtle effects of the competing client interests on the attorney's judgment:

> Were [the lawyer] permitted to represent a client whose cause is related and adverse to that of his former client he would be called upon to decide what is confidential and what is not, and, perhaps, unintentionally to make use of confidential information received from the former client while espousing his cause.

113 F. Supp. at 269.

110. *Developments, supra* note 72, at 1318.

111. Before *T.C. Theatre*, courts required the former client to establish that confidential information actually revealed to the lawyer in the previous representation was useful to the adverse party in the present lawsuit. Disqualification motions usually failed, because of the difficulty of proof. *See* Note, *Disqualification of Attorneys Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 919, (1955); ABA COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILTY, FORMAL OP. 324, n.6 (1975).

112. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1981). One decision lucidly articulated the applicability of the principles of Canon 9 in this context:

> A strict construction of a lawyer's duties in cases like this one would give clients cause to feel they had been mistreated. If an attorney is permitted to defend a motion to disqualify by

of evidence to prove actual misconduct by counsel would "require the disclosure of the very matters intended to be protected by the rule."[113]

Whether a "substantial relationship" exists between a prior representation and a current lawsuit depends on the circumstances of each case. In certain situations the relationship is "patently clear."[114] When both the current and prior professional relationships are based on the same events or transactions, the courts readily find that a substantial relationship exists.[115] Similarly, the courts uniformly find a substantial relationship when the attorney represented the former client in an earlier stage of the same litigation.[116] At the other extreme, the courts routinely find no substantial relationship when the prior representation concerned subjects unconnected to the case before the court.[117]

Between the two extremes, the definition of "substantial relationship" is sometimes unclear.[118] Most courts examine the closeness of the contested issues in the two representations.[119] In addition, some courts have disqualified counsel because the lawyer or firm learned useful confidential information concerning the policies or practices of a former client.[120]

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showing that he received no confidential information from his former client, the client, a layman who has reposed confidence and trust in his attorney, will feel that the attorney has escaped on a technicality. If courts protect only a client's disclosures to his attorney, and fail to safeguard the attorney-client relationship itself—a relationship which must be one of trust and reliance—they can only undermine the public's confidence in the legal system as a means for adjudicating disputes.

E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 395 (S.D. Tex. 1969) (footnote omitted).

113. 113 F. Supp. at 269. *Accord* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 224 n.3 (7th Cir. 1978); NCK Org. v. Bregman, 542 F.2d 128, 134–35 (2d Cir. 1976); Realco Servs. v. Holt, 479 F. Supp. 867, 872 (E.D. Pa. 1979).

114. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754–55 (2d Cir. 1975) (discussing such cases).

115. *See, e.g.*, T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F.Supp. 265, 268–69 (S.D.N.Y. 1953); King v. King, 52 Ill. App. 3d 749, 752–53, 367 N.E.2d 1358, 1360 (1977); *In re* Palmieri, 76 N.J. 51, 61–63, 385 A.2d 856, 861 (1978).

116. *See, e.g., In re* Corrugated Container Antitrust Litig., 659 F.2d 1341, 1345–46 (5th Cir. 1981); Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975).

117. *See, e.g.*, Moritz v. Medical Protective Co., 428 F. Supp. 865, 874 (W.D. Wis. 1977); Tinkle v. Ravena Dev. Corp., 60 A.D.2d 697, 697, 400 N.Y.S.2d 393, 394 (1977); Pennsylvania Power & Light Co. v. Gulf Oil Corp., 74 Pa. D. & C.2d 431, 440–41 (C.P. Lehigh Co. 1975).

118. Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 754–57 (2d Cir. 1975).

119. *See, e.g., In re* Corrugated Container Antitrust Litigation, 659 F.2d 1341, 1346 (5th Cir. 1981); Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 646 F.2d 1020, 1029–30 (5th Cir. 1981); Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 225 (7th Cir. 1978); Reardon v. Marlayne, Inc., 83 N.J. 460, 475, 416 A.2d 852, 860 (1980).

The Sixth Circuit finds a substantial relationship when the former representation relates to the "subject matter" of the current litigation, even without a showing that the prior representation could be connected with contested issues in the current case. *See* General Elec. Co. v. Valeron Corp., 608 F.2d 265, 267 (6th Cir. 1979). The Ninth Circuit apparently has taken a similar approach. *See* Trone v. Smith, 621 F.2d 994, 998–99 (9th Cir. 1980) (substantial relationship even when issues in former and current cases not identical).

120. In Reardon v. Marlayne, Inc., 83 N.J. 460, 416 A.2d 852 (1980), the New Jersey Supreme Court ordered the disqualification of plaintiff's counsel in part because the attorney's prior representation of the defendant made him aware of defense strategies. In Glueck v. Jonathan Logan, Inc., 653

In essence, the civil disqualification cases analyze the nature of the prior client representation and the usefulness of information that a lawyer might have learned from that type of representation, rather than trying to reconstruct what the lawyer actually learned or used against the former client. The opposite is true in criminal cases. Even though there may be a "substantial relationship" between the subject matter of the defense lawyer's prior representation of a prosecution witness and issues that are relevant to an effective cross-examination of the witness on behalf of the defendant, the defendant's conviction will not be reversed unless he can show that his lawyer did not in fact probe those issues, in order to protect the confidences of the prosecution witness.

United States v. Alberti[121] illustrates the dichotomy between the treatments of successive representation in civil and criminal cases. *Alberti* involved a conspiracy to print and distribute $200,000 in counterfeit bills. Edward Korjus, one of the co-conspirators, pled guilty to his indictment and subsequently was named as an unindicted co-conspirator in a related indictment charging Mary Alberti with various counterfeiting offenses. Alberti retained the lawyer who had earlier represented Korjus in the companion case. When Alberti's case proceeded to trial, Korjus was called as a government witness. The lawyer informed the trial court of his earlier representation of Korjus, but stated that there was no conflict of interest, since Korjus had told him a version of the facts that exonerated Alberti completely. Korjus's courtroom testimony, however, seriously implicated Alberti, describing her as "the moving force" in certain aspects of the conspiracy.[122] Alberti was convicted and sentenced to seven years in prison.

If Korjus had sought to disqualify Alberti's lawyer in an analogous civil action, the Second Circuit would have granted the motion without hesitation, since the opportunity for the lawyer to disclose Korjus's confidences

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F.2d 746 (2d Cir. 1981), the plaintiff alleged that he was wrongfully discharged by Logan. The Court of Appeals affirmed the District Court's disqualification order in part because plaintiff's counsel, who represented an entity integrally related to the defendant, could learn about the defendant's hiring and firing policies.

121. 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973).

122. The Second Circuit's opinion gives no indication why the prosecutor, although present when defense counsel told the court that Korjus had exonerated Alberti, *id.* at 880, did not volunteer that Korjus's testimony would contradict the version of the facts he had previously given to Alberti's counsel. The appellate court also overlooked the fact that the trial court made no inquiry into the potential conflict of interest after defense counsel apprised the court of the possible problem. In retrospect, defense counsel's comments to the court seem absurd. If Korjus's version of the facts exonerated Alberti completely, why was the government calling Korjus as a witness, and presumably as its star witness?

would be "patently clear."[123] Disqualification would be required, not merely because the two cases were "substantially related," but because they were "exactly the same litigation."[124] The court would not have inquired whether the lawyer was actually protecting Korjus's confidences and secrets or was using them for Alberti's advantage. The conflict in client obligations standing alone would have been sufficient to disqualify counsel.

In the actual criminal case, however, the Second Circuit affirmed the conviction because Alberti could not show that she had been harmed by the lawyer's successive representation.[125] Relying on the trial transcript, the court concluded that Alberti "actually derived some advantage . . . [as] a result of the information that [the attorney] had received from Korjus during the time that he represented him."[126] The record also showed a "lengthy and vigorous" cross-examination.[127] Finally, the court noted that Korjus had been sentenced before Alberti's trial and concluded that there was no conflict of interest because "there was no longer any interest of Korjus that [the lawyer] had to protect and that might have compromised his representation of Alberti."[128]

The argument that Alberti "actually derived some advantage" from his prior representation is frequently used by appellate courts for affirmances in similar cases.[129] According to this rationale, another defense lawyer would not be privy to confidential information concerning the witness and could not be as effective in cross-examination or in pre-trial investigation.[130] To the extent that secrets can be uncovered through investigation by any counsel, however, a defendant is prejudiced by being denied a lawyer who can freely cross-examine the witness.[131]

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123. That Korjus was only a *witness* against Alberti, and not an *adverse party*, as in the civil disqualification cases, should not affect the outcome. The adversity requirement of the substantial relationship test is satisfied when the "interests" of the former client are "materially adverse" to the interest of the current client. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1983). It seems logical to apply this standard to a hostile witness, regardless of whether or not the two clients are both parties in the same case.

124. Hull v. Celanese Corp., 513 F.2d 568, 571 (2d Cir. 1975).

125. *Alberti*, 470 F.2d at 881.

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* United States v. James, 505 F.2d 898, 900 (5th Cir. 1975); Harrison v. United States, 387 F.2d 614, 615 (5th Cir. 1968); State v. Means, 268 N.W.2d 802, 814 (S.D. 1978).

130. United States v. Jeffers, 520 F.2d 1256, 1265–66 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); *Alberti*, 470 F.2d at 881.

131. "Unlike [defense counsel, who had previously represented the prosecution witness and] who was not free to use the privileged information, another attorney ingenious enough to ferret out the same information . . . would have been free to use it." People v. Grigsby, 47 Ill. App. 3d 812, 819, 365 N.E.2d 481, 485 (1977).

A lawyer who previously represented the witness may feel compelled to avoid probing confidential subjects during cross-examination. Justice Stevens, while on the Seventh Circuit, commented that:

The *Alberti* court's reliance on the "lengthy and vigorous" cross-examination of the prosecution witness exemplifies another frequent rationale for affirming convictions in former-client conflict cases.[132] A transcript of what appears to be a thorough cross-examination, however, has little bearing on the existence of a conflict of interest.[133] The lawyer suffering from a conflict may avoid only one subject on cross-examination and extensively cover all others, but the defendant may still be denied a fair opportunity for acquittal.

Finally, the Second Circuit's conclusion that there was no conflict of interest since Korjus had been sentenced before Alberti's trial[134] reflects a frequently made distinction between the "past" representation of a prosecution witness and the simultaneous representation of both defendant and witness.[135] The test usually enunciated for defining "past" representation is whether the lawyer's representation of the witness ended before the commencement of the defendant's trial.[136] If the lawyer represented the witness in a criminal matter, as in *Alberti*, the courts usually conclude that the representation of the witness concluded when the witness was sentenced.[137] After sentencing, the courts reason, a lawyer has no continuing obligation to his client.[138]

There are several serious deficiencies in this analysis. First, it ignores the plain language of the *Model Code of Professional Responsibility*, which states: "The obligation of a lawyer to preserve the confidences and

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"Most obviously, there might be a temptation to use [confidential] information to impeach the former client. We do not regard this risk as serious, however, for we think the courts can generally rely on the sound discretion of members of the bar to treat privileged information with appropriate respect." United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 423 U.S. 1066 (1976). For examples of cases in which the defendant was *disadvantaged* by his lawyer's prior representation of a prosecution witness, see Ross v. Heyne, 638 F.2d 979 (7th Cir. 1980); United States v. Alvarez, 580 F.2d 1251 (5th Cir. 1978).

132. *See* United States v. Donatelli, 484 F.2d 505, 507 (1st Cir. 1973); Olshen v. McMann, 378 F.2d 993, 994 (2d Cir. 1967); State v. Theodore, 118 N.H. 548, 551, 392 A.2d 122, 124 (1978); State v. Means, 268 N.W.2d 802, 814 (S.D. 1978).

133. The Supreme Court recently noted in an analogous context that the "evil" of the conflict "is in what the advocate finds himself compelled to *refrain* from doing . . . ." Holloway v. Arkansas, 435 U.S. 475, 490 (1978) (emphasis added).

134. United States v. Alberti, 470 F.2d 878, 881 (2d Cir. 1972), *cert. denied* 411 U.S. 919 (1973).

135. *See* United States v. Jeffers, 520 F.2d 1256, 1264 n.13 (7th Cir. 1975) (Stevens, J.) (discussing distinction), *cert. denied*, 423 U.S. 1066 (1976). A similar distinction between successive representation and simultaneous representation is made in civil cases. *See* IBM Corp. v. Levin, 579 F.2d 271, 280 (3d Cir. 1978); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384, 1386–87 (2d Cir. 1976); *cf.* Grievance Comm. v. Rottner, 152 Conn. 59, 65–66, 203 A.2d 82, 84–85 (1964) (stressing importance of element of simultaneity in finding of ethical violation).

136. *See* United States *ex rel.* Kachinski v. Cavell, 453 F.2d 581, 582 (3d Cir. 1971); Commonwealth v. Smith, 362 Mass. 782, 783, 291 N.E.2d 607, 608 (1973); Commonwealth v. Biancone, 393 A.2d 1221, 1223 (Pa. Super. 1978).

137. *Kachinski*, 453 F.2d at 582–83.

138. *Id.* at 583; Commonwealth v. Smith, 362 Mass. at 783–84, 291 N.E.2d at 608.

secrets of his client continues after the termination of his employment."[139] To the extent that Alberti's lawyer learned such "confidences" and "secrets" in the course of representing Korjus, he owed a continuing duty to Korjus not to reveal them. When a lawyer is required to cross-examine a former client on the very subject of their professional relationship and the credibility of the former client's testimony is at issue, the lawyer must choose between violating Canon Four or providing ineffective representation to his current client.[140]

Moreover, the rule that a prosecution witness is a "former client" if he has been sentenced before the defendant's *trial* commences ignores conflict of interest problems that may result from the simultaneous representation of the witness and defendant in the pre-trial stages of a case. If the lawyer represents both clients before the witness enters a guilty plea, the conflict of interest is especially great. It is in the defendant's interest for the potential witness to plead not guilty and remain unavailable to the government. Counseling the witness to enter a guilty plea is tantamount to contributing to the government's evidence against the remaining defendant.[141] Similarly, the lawyer's representation of the potential prosecution witness during the pre-trial stage of the defendant's case often affects the defendant's own opportunities to plead to a reduced charge in return for cooperation with the government.

There are numerous problems with the approach taken by the courts in the *Alberti* situation. The reviewing court should not have to speculate about what counsel might have omitted in cross-examination, why the questions were omitted, and whether the defendant would have had a stronger case if the questions were asked, especially since lawyers often purposefully omit subjects on cross-examination for a variety of tactical reasons.[142] Criminal case law should be brought in line with civil disqual-

139. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1981); *cf.* T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (lawyer "is enjoined for all time" from disclosing client's confidences).

140. For example, an essential line of cross-examination in *Alberti* was an attack on Korjus's motives in testifying for the government. Such an attack necessarily included a thorough probe of the promises made to and by the witness in his plea bargain. It also had to demonstrate to the jury that Korjus received a suspended two-year prison sentence, and make the inference that if he did not "do well" in his testimony he might jeopardize his own freedom. Alberti's lawyer, however, was obligated by DR 4-101(A) of the *Model Code of Professional Responsibility* not to "embarrass" Korjus and not to raise matters learned during their former relationship which were "likely to be detrimental" to Korjus. An independent lawyer, not impeded by such professional obligations, would be free to cross-examine at will concerning the terms of Korjus's plea bargain and his motives for testifying.

141. Some courts hold that when a lawyer represents co-defendants, an offer from the prosecution for one client to plead guilty in return for cooperation against the remaining client or clients *automatically* creates a conflict of interest. Chambers v. State, 264 Ark. 279, 281-82, 571 S.W.2d 79, 81-82 (1979); People v. Superior Court, 94 Cal. App. 3d 626, 629, 156 Cal. Rptr. 487, 488 (1979).

142. *See* P. BERGMAN, TRIAL ADVOCACY 155-71 (1979) (attorney should limit cross-examination to relevant subjects); R. KEETON, TRIAL TACTICS AND METHODS 95 (2d ed. 1973) (attorney should use knowledge of witness as guide for subjects to omit); F. WELLMAN, THE ART OF CROSS-EXAMINATION 18-19 (1936) (attorney should avoid asking "reckless" questions).

ification decisions by focusing more on avoiding potential conflicts of interest rather than speculating after the fact about what might have happened in the trial court. The next subsection explores the possibility of bringing civil disqualification principles to the criminal courts.

3. *Applying a Substantial Relationship Test in Criminal Cases*

Invoking the civil disqualification standard in criminal cases involves two steps. First, the courts must adopt the substantial relationship test to determine whether the cross-examination of a former client poses an unacceptable risk of conflict of interest. Second, courts should implement an appropriate pre-trial procedure to avoid conflict of interest problems in advance.

Judges in criminal cases should accept as a basic principle that when an earlier professional relationship is substantially related to the issues on which a former client will be cross-examined, the lawyer who must conduct the cross-examination has a conflict between the duties owed to each client. The ABA's *Model Rules of Professional Conduct* Rule 1.9(a) specifically adopts substantial relationship terminology to prohibit lawyers from representing clients whose interests are adverse to those of former clients.[143] Nothing in the Rule or its Official Comment limits the test to civil cases, and there is no sound reason why this problem is any less troublesome in criminal practice. Since the Sixth Amendment entitles the defendant to counsel "untrammeled" by divided loyalty,[144] the lawyer must be disqualified, unless both the witness and the defendant make an informed decision to waive the conflict.[145]

The substantial relationship test not only assures effective assistance of counsel for the defendant, but also guarantees to the witness the confidentiality of his relationship with the lawyer. It is fair to assume that often the former client who testifies for the prosecution was himself represented on a criminal charge.[146] Rules of confidentiality are designed to promote open and trusting communication between client and lawyer. Trust and

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143. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(a) (1983).

144. Glasser v. United States, 315 U.S. 60, 70 (1942).

145. *See infra* pp. 49–51, 59–61.

146. This is certainly true for all clients of a public defender office handling only criminal cases. For example, all former clients of the Maricopa County Public Defender Office reported in the study discussed *supra* pp. 7–11 had been criminal defendants. With private counsel, the number depends on the percentage of the attorney's practice (or his firm's practice) that is devoted to criminal law. A recent survey, conducted by the author, of all lawyers handling criminal cases in Maricopa County, Arizona, found that only one fourth of the private lawyers interviewed devoted more than 50% of their practice to criminal law. Lowenthal, *Theoretical Notes on Lawyer Competency and an Overview of the Phoenix Criminal Lawyer Study*, 1981 ARIZ. ST. L.J. 451, 497. This suggests that, at least in some jurisdictions, a substantial proportion of the clients of criminal lawyers in private practice are represented in non-criminal matters.

communication are difficult to develop when the client must disclose information related to his own wrongdoing, particularly to a lawyer from a different economic, ethnic, or racial group, as is frequently the case in criminal representation.[147] A rule that permits the lawyer to probe into the subject matter of the lawyer-client relationship at a later time, when the former client is under oath in a public courtroom, can only undermine that trust.

An appropriate pre-trial mechanism could take several forms. Both the defense lawyer and the prosecutor might be placed under an ethical responsibility to notify the court promptly whenever either counsel discovers that the defense lawyer previously represented a witness for the prosecution.[148] The trial court could then conduct an inquiry to determine if a substantial relationship exists between the earlier representation and foreseeable issues in the current case.[149] If the trial court finds such a relationship, defense counsel should be disqualified unless both the defendant and the witness knowingly waive the conflict. If the court finds no substantial relationship, the case would proceed to trial; if the defendant is convicted, he can prevail in a post-conviction challenge by showing that a conflict of interest actually impaired counsel's cross-examination of the witness.[150] Finally, if neither party apprises the court before trial of the earlier representation, the defendant should be permitted to challenge his conviction by demonstrating that a substantial relationship existed, regardless of whether he can show that counsel was actually impaired in cross-examination.[151]

Although appellate courts occasionally have emphasized the importance of defense counsel's disclosing any prior representation to the court before

147. *See* 3 A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 1-64 to 1-65 (1974).

148. A requirement that counsel for either party inform the court immediately upon learning of prior representation probably will have more impact on defense counsel than on prosecutors, because the government attorney will often not be cognizant of an earlier representation unless notified by either the defense lawyer or the witness. Sometimes the witness may be aware of the identity of the defense lawyer before trial (e.g., through participation at a preliminary hearing), but frequently the witness will not learn this fact until he is sworn to testify in court. On the other hand, assuming that he is provided a list of prosecution witnesses before trial, the defense lawyer can be expected to discover the potential conflict of interest.

149. Federal district courts are required to conduct a similar inquiry in all joint representation cases. *See* FED. R. CRIM. P. 44(c); United States v. Cox, 580 F.2d 317, 320-21 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); United States v. Waldman, 579 F.2d 649, 651-52 (1st Cir. 1978); Ford v. United States, 379 F.2d 123, 124-26 (D.C. Cir. 1967). This inquiry is not compelled by the Sixth Amendment, but is instead an exercise of the Court's supervisory power. Cuyler v. Sullivan, 446 U.S. 335, 346 & n.10 (1980).

150. *See infra* note 159 (discussing necessity of proving actual prejudice).

151. However, if the prosecution can demonstrate that defense counsel deliberately failed to notify the trial court of the earlier representation, the defendant probably should be required to meet the *Cuyler* actual-impairment standard.

trial,[152] no rule of professional responsibility presently requires disclosure.[153] Such a rule would be desirable for several reasons. First, it would provide an effective means of alerting the trial court to the danger of conflict of interest before trial,[154] thus avoiding a later mistrial or reversal of the defendant's conviction. Second, it would minimize the risk of manipulation by defendants or their lawyers who intend to create an issue on appeal beyond the control of trial courts to prevent.[155] Third, it would protect witnesses by lessening the risk that confidential information will be disclosed during cross-examination, and would protect defendants from the risk that counsel will refrain from certain issues on cross to preserve the sanctity of the earlier lawyer-client relationship.

The trial court's determination of what constitutes a substantial relationship between the earlier representation of the prosecution witness and the foreseeable issues in the current case could rely on three decades of civil disqualification cases. For example, if the defense counsel had represented the witness in an earlier stage of the same prosecution or in a companion case, the existence of a substantial relationship would be "patently clear."[156] Disqualification would also be appropriate if there were a reasonable likelihood that the prosecution witness would retain the defense lawyer in the future. Appellate courts have reversed convictions where "the lawyer's pecuniary interest in possible future business may cause him to avoid vigorous cross-examination which might be embarrassing or offensive to the witness."[157] Such reversals have occurred not because the defendant could demonstrate that his lawyer actually refrained

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152. *See* Olshen v. McMann, 378 F.2d 993, 994 (2d Cir. 1967). On at least two occasions, the Supreme Court has noted a duty of defense counsel to notify the court immediately upon discovering a conflict of interest. Cuyler v. Sullivan, 446 U.S. 335, 346 & n.11 (1980); Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978); *see also* United States v. Jeffers, 520 F.2d 1256, 1263 & n.11 (7th Cir. 1975) (foreshadowing *Holloway* and *Cuyler*), *cert. denied*, 423 U.S. 1066 (1976). I am suggesting a further duty of counsel: notifying the court of successive representation, regardless of whether or not counsel believes a conflict of interest exists.

153. The ABA instructs counsel to inform the defendant, but not the court, of any possible interest that might interfere with counsel's loyalty to the defendant. *See* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.5(a) (Approved Draft 1971).

154. In civil cases, the former client is a *party* to the litigation, represented by counsel, and presumably aware of the identity of opposing counsel from the time of pleadings, or at least from the time of the taking of the former client's deposition. Therefore, the former client will normally have an opportunity to move for disqualification before trial. In a criminal case, by contrast, the former client is only a witness for the government and often may not discover the identity of defense counsel until he is called to testify. The judge—and the prosecutor—may not be aware of the prior professional relationship unless it is disclosed by defense counsel.

155. *See supra* p. 26.

156. *See supra* p. 30.

157. United States v. Jeffers, 520 F.2d 1256, 1264 (7th Cir. 1975) (footnote omitted), *cert. denied*, 423 U.S. 1066 (1976); *see* Zurita v. United States, 410 F.2d 477, 478-80 (7th Cir. 1969); United States *ex rel.* Miller v. Myers, 253 F. Supp. 55, 57 (E.D. Pa. 1966); People v. Stoval, 40 Ill. 2d 109, 112-13, 239 N.E.2d 441, 443-44 (1968).

from asking specific questions, but instead because the situation itself resulted in counsel's divided loyalty.

When the earlier representation of the prosecution witness was totally unrelated to the defendant's prosecution, no substantial relationship exists and, as in civil cases, counsel should not be disqualified.[158] The defendant may wish to pursue the issue in post-conviction proceedings, but unless he requested a substitution of counsel before trial, the reviewing court should require him to demonstrate that cross-examination was actually impaired under the *Cuyler v. Sullivan* standard.[159]

The most difficult cases under the substantial relationship rule would occur, as they do under the current standard, when the earlier representation did not concern the same events or transactions as the defendant's case, but nonetheless might provide counsel with information useful for the cross-examination of the witness.[160] Again certain principles developed in civil cases would facilitate the court's determination. First, the court should consider carefully the extent of the attorney's access to information potentially useful for cross-examination. If, for example, the lawyer's earlier representation of the witness was only brief or peripheral,[161] the court should not assume, absent a showing by either party, that the lawyer acquired useful confidential information.[162] Another practical consideration might be the importance of the witness to the prosecution's case[163] and the collateral question of the importance to the defense of challenging the witness's credibility.[164]

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158. For examples of such cases, see Bryan v. United States, 645 F.2d 842, 843 (9th Cir. 1981); United States *ex rel.* Kachinski v. Cavell, 453 F.2d 581, 582-83 (3d Cir. 1971); Bynum v. United States, 422 F.Supp. 1153, 1155 (S.D.N.Y. 1976); Crisp v. State, 271 Ind. 534, 394 N.E.2d 115 (1979); People v. Frisbie, 70 A.D.2d 1053, 1053-54, 417 N.Y.S.2d 551, 552-53 (1979).

159. 446 U.S. 335, 350 (1980); *see supra* pp. 26-27. Justice Brennan's concurring opinion in *Cuyler* took a position similar to the one I have suggested here. He reasoned that if a defendant was made aware of a possible conflict of interest in the trial court but did not object to counsel's continuing representation, the defendant should be required to meet the *Cuyler* test for post-conviction relief. 446 U.S. at 353 & n.3 (Brennan, J., concurring). However, according to Justice Brennan, if the defendant was not apprised in the trial court of the risk of conflict of interest, he should be required to prove only the "possibility" of a conflict of interest in order to obtain a new trial with different counsel. *Id.*

160. *See supra* p. 3.

161. *See* Silver Chrysler Plymouth, Inc. v. Chrysler Motors Corp., 518 F.2d 751, 753-754 (2d Cir. 1975).

162. *Id.* at 754-57. In the criminal context, see United States v. Donatelli, 484 F.2d 505, 506-07 (1st Cir. 1973); Commonwealth v. Wright, 376 Mass. 725, 730-33, 383 N.E.2d 507, 511-12 (1978).

163. *Compare* United States *ex rel.* Kachinski v. Cavell, 453 F.2d 581, 583 (3d Cir. 1971) (Gibbons, J., dissenting) (witness was "key Commonwealth witness") *with* Brown v. United States, 665 F.2d 271, 272 (9th Cir. 1982) (witness relatively unimportant, since government's incriminating evidence was "massive").

164. For example, in Taylor v. United States, 126 F. Supp. 764 (D.D.C. 1954), *rev'd on other grounds*, 226 F.2d 337 (D.C. Cir. 1955) (per curiam), defense counsel had represented an informer who allegedly purchased narcotics from the defendant. The government dismissed the witness's case three weeks before the defendant's trial. Since the defense lawyer's former client was the principal government witness against the defendant and was apparently testifying in return for the dismissal of his own case, the critical issue at trial was the former client's credibility.

Requiring counsel to report any prior representation to the court before trial would reduce the frequency of convicted defendants' raising the issue for the first time in post-conviction proceedings, especially if sanctions are available for failure to make a timely disclosure to the trial court.[165] Nonetheless, occasionally a defendant may raise the issue in post-conviction proceedings even though the matter was not brought to the attention of the trial court. In such cases, it would make most sense to apply the substantial relationship test retroactively unless there is evidence that the defendant purposefully failed to raise the issue in the trial court. Such a procedure still avoids the worst problems occurring under the current standard, achieves consistency with the cases decided upon pre-trial motions, and treats the defendant fairly.

Two circumstances deserve further analysis, both under existing law and under the proposed substantial relationship formulation. The first occurs when the defense notifies the trial court of the prior representation and requests a substitution of counsel, but the court refuses to grant the request. The second arises when the prosecution moves to disqualify defense counsel but both the defense lawyer and the defendant resist the motion.

B. *Defense Counsel Moves to Withdraw in the Trial Court*

> The government prosecutes Jane for murder. Jane's defense is that she was in another city at the time of the offense. During the trial the prosecutor calls Bill as a surprise witness to place Jane at the scene of the offense. Jane's lawyer moves to withdraw from the case, stating that Bill is a former client of his, and that he cannot cross-examine Bill without revealing Bill's confidences. The court asks Jane's counsel to disclose the facts underlying the alleged conflict of interest, but the lawyer refuses, claiming that the information is privileged. The court denies the motion to withdraw.

These facts raise several issues. First, if Jane is convicted, should a reviewing court apply a different standard from the one that is followed when no motion to withdraw was made in the trial court? Should a dis-

165. In Holloway v. Arkansas, 435 U.S. 475 (1978), Chief Justice Burger commented in dicta that when defense counsel files an "untimely" motion to withdraw for "dilatory" reasons, the trial court has the "ability to deal with counsel who resort to such tactics." 435 U.S. at 486-87. In Coffelt v. Shell, 577 F.2d 30, 31 (8th Cir. 1978) (per curiam), the defense lawyer labored under a conflict of interest, but allowed the case to go to trial without diligently reporting the conflict to the court. The court later reduced counsel's fee from $1,000 to $100, despite the fact that the lawyer had been retained privately by the defendant. *Cf. In re* Sutter, 543 F.2d 1030, 1035 (2d Cir. 1976) (counsel fined $1,500 for his "recklessness" in engaging in two representations, resulting in delay of second trial, without informing either judge).

tinction be made between a motion to withdraw that is filed weeks before trial and one not made until the witness actually testifies? Can the court require counsel to disclose why he believes that he is restricted from cross-examining Bill adequately? Should the case be decided differently if Bill states that he waives his lawyer-client privilege and consents to all ethical improprieties that result from the disclosure of his confidences?

1. *The Standard of Review when Counsel's Motion to Withdraw is Denied*

If a trial court denies defense counsel's motion to withdraw and the defendant is convicted, the defendant will probably claim that the denial violated his right to effective assistance of counsel. The proper test to apply to such motions, and that used by most courts today, was articulated in a 1978 Supreme Court decision, *Holloway v. Arkansas.*[166] In *Holloway*, a public defender representing three co-defendants moved three weeks before trial, and again on the first day of trial, for separate counsel for each defendant because of conflicts in their respective trial strategies, but the court denied the motions. Even though the lawyer had not stated a detailed basis for the claimed conflict of interest, the Supreme Court held that his motions imposed a duty on the trial judge either to appoint independent counsel for each defendant or to "take adequate steps to ascertain whether the risk [of conflict of interest] was too remote" to require separate lawyers.[167] Chief Justice Burger reasoned that "several interrelated considerations" should compel a trial court to grant such motions.[168] First, the defense lawyer

> "is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." . . . Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. . . . Finally, attorneys are officers of the court, and "'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.' "[169]

The Court concluded that the trial court's failure to appoint independent counsel after a timely motion required reversal even without a showing of specific prejudice to the defendants, because the right to effective counsel

166. 435 U.S. 475 (1978).
167. *Id.* at 484.
168. *Id.* at 485.
169. *Id.* at 485–86 (quoting State v. Davis, 110 Ariz. 29, 31, 514 P.2d 1025, 1027 (1973), and State v. Brazile, 226 La. 254, 266, 75 So. 2d 856, 860–61 (1954)).

is both "fundamental" and "absolute."[170] Most lower courts have followed *Holloway* in instances of successive representation.[171]

Although *Holloway* involved joint representation rather than an alleged conflict of interest with a prosecution witness, the Court's discussion of the trial judge's duty when counsel moves to withdraw applies logically to the latter situation. The defendant's lawyer, rather than the court, is in the best position to determine the strategy of the defense and to foresee how the cross-examination of prosecution witnesses will affect that defense. The defense attorney is also the only participant in the trial who is aware of the usefulness of the particular confidences or secrets of a prosecution witness. It follows, after *Holloway*, that a trial court must accept the word of an "officer of the court" that his cross-examination of a prosecution witness will be impaired by a prior representation, unless the court is assured that the risk of a conflict of interest is "remote."[172] Since denial of the motion constitutes judicial interference with the defendant's Sixth Amendment right to unimpaired counsel, *Holloway* requires reversal even though the defendant cannot show that he has been prejudiced by the court's action.

Applying *Holloway* to witness-defendant conflicts of interest comports with the civil disqualification case law and with the approach to criminal cases suggested earlier in this Article. *Holloway* places on defense counsel the primary responsibility for recognizing potential conflicts of interest before trial and reporting them to the court. By requiring the trial court to grant counsel's motion unless the risk of conflicting interests is "remote," *Holloway* encourages the *avoidance* of ethical problems. The test

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170. The Court interpreted an earlier joint representation case, Glasser v. United States, 315 U.S. 60 (1942), as requiring automatic reversal when a defense lawyer's request for separate counsel is denied by the trial judge, and quoted language from *Glasser* which emphasized that "[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." 435 U.S. at 488 (quoting *Glasser*, 315 U.S. at 76). The Chief Justice also noted that since most conflicts of interest result in a lawyer's refraining from doing something on behalf of a defendant, the typical record would fail to reveal the prejudicial effects of a conflict of interest even when one occurs. Hence "a rule requiring a defendant to show that a conflict of interest . . . prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application." 435 U.S. at 490.

171. *See, e.g.*, United States v. Young, 644 F.2d 1008, 1012 (4th Cir. 1981); United States v. Martinez, 630 F.2d 361, 363 (5th Cir. 1980); United States v. Morando, 628 F.2d 535, 536 (9th Cir. 1980); State v. Franklin, 400 So. 2d 616, 620 (La. 1981). A few courts have refused to follow *Holloway* in successive representation cases. One court, for example, distinguished *Holloway* on the ground that it was limited to joint representation cases. State v. Theodore, 118 N.H. 548, 550, 392 A.2d 122, 123-24 (1978). Other courts have simply ignored *Holloway*, and have required a petitioner for post-conviction relief to prove that he was prejudiced by an actual conflict of interest with a prosecution witness. *See* Theodore v. New Hampshire, 614 F.2d 817, 820-22 (1st Cir. 1980); State v. Means, 268 N.W.2d 802, 813-14 (S.D. 1978). Yet another court applied the standard in *Cuyler v. Sullivan*, *see supra* pp. 26-27, rather than *Holloway*, to deny habeas relief, even though the petitioner's trial counsel moved to withdraw from the case well in advance of trial. Alexander v. Housewright, 667 F.2d 556, 558 (8th Cir. 1981).

172. *See* Holloway v. Arkansas, 435 U.S. 475, 484 (1978).

eliminates highly speculative searches in post-conviction proceedings for an actual conflict of interest. Finally, *Holloway* recognized the sensitive problem counsel encounters in preserving client confidences when a trial court analyzes the factual basis of a conflict of interest. Nevertheless, lower courts have encountered several difficulties when applying *Holloway* to witness-defendant conflicts of interest.

2. *The Timing of a Motion to Withdraw*

Both *Holloway* and *Cuyler* recognized an obligation of defense counsel to advise the court immediately upon discovering a conflict of interest.[173] *Holloway* emphasized that counsel's initial motion to withdraw had been entered weeks before trial and was therefore timely.[174] It also noted that trial judges have the "ability to deal with" those "unscrupulous" lawyers who wait until trial before moving to withdraw "for purposes of delay or obstruction of the orderly conduct of the trial,"[175] implying that courts might legitimately overrule an untimely motion to withdraw.[176] Lower court decisions demonstrate a similar concern about untimely motions alleging witness-defendant conflicts. Of twelve reported cases in which trial courts denied motions to withdraw, only two involved a motion made before trial.[177] The motion was entered either during trial or on the eve of trial in each of the other ten.[178] Trial courts seem especially wary of a tardy motion that appears to be a "tactic" or a "belated afterthought"[179] or that would necessitate delay, added expense, and inconvenience to jurors and witnesses.[180]

These decisions reflect the experience of public defenders who participated in the survey described in Part II of this Article.[181] Forty-nine of

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173. Cuyler v. Sullivan, 446 U.S. 335, 346 (1980); Holloway v. Arkansas, 435 U.S. 475, 485–86 (1978).

174. 435 U.S. at 484.

175. *Id.* at 486–87.

176. However, this would seem to be very harsh for the defendant if he is totally unaware of the prior representation before counsel's motion is made and if he is not a party to the stratagem.

177. *See* Alexander v. Housewright, 667 F.2d 556, 558 (8th Cir. 1981); People v. Kyllonen, 80 Mich. App. 327, 330–31, 263 N.W.2d 55, 57 (1977).

178. *See* United States v. Martinez, 630 F.2d 361, 362 (5th Cir. 1980); United States v. Morando, 628 F.2d 535, 536 (9th Cir. 1980); Theodore v. New Hampshire, 614 F.2d 817, 819 (1st Cir. 1980); United States v. Partin, 601 F.2d 1000, 1006 (9th Cir. 1979); United States v. Jeffers, 520 F.2d 1256, 1261 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); United States v. Cochran, 499 F.2d 380, 394 (5th Cir. 1974); United States v. Donatelli, 484 F.2d 505, 506 (1st Cir. 1973); People v. Grigsby, 47 Ill. App. 3d 812, 814–15, 365 N.E.2d 481, 482 (1977); State v. Franklin, 400 So. 2d 616, 618–19 (La. 1981); State v. Means, 268 N.W.2d 802, 813 (S.D. 1978).

179. *See* United States v. Cochran, 499 F.2d 380, 394 (5th Cir. 1974.)

180. *See* Theodore v. New Hampshire, 614 F.2d 817, 819 (1st Cir. 1980) (discussing trial court's "pique at . . . last minute attempt to withdraw"); State v. Franklin, 400 So. 2d 616 (La. 1981); People v. Grigsby, 47 Ill. App. 3d 812, 820, 365 N.E.2d 481, 486 (1977).

181. *See supra* pp. 11–17. The survey was conducted one year before the Supreme Court decision in Holloway v. Arkansas, 435 U.S. 475 (1978).

fifty-nine offices indicated that the courts in their respective jurisdictions routinely permit withdrawal and grant continuances to allow the substituted counsel to prepare, even if motions to withdraw are not filed until trial.[182] Several defenders noted that because they normally discover the identity of prosecution witnesses well in advance of trial, motions to withdraw are rarely made at the trial stage. However, a few respondents noted significant trial court reluctance to grant continuances at the trial stage without a strong or detailed factual showing of conflict.[183]

Trial courts may be reluctant to grant tardy motions to withdraw because of a legitimate concern for efficient judicial administration, but it would be short-sighted to assume that most untimely motions are the "tactics" of "unscrupulous" lawyers. Interestingly, in each of the ten reported cases in which trial courts denied late motions to withdraw, defense counsel did not learn the identity of the prosecution witness until the eve of the trial or during the trial itself. Each case involved a "surprise witness" for the government. In one instance, the government instructed the witness to use a fictitious name when testifying before a grand jury.[184] In another case, the government successfully moved the court to add the witness's name to the prosecution witness list one day before the trial was to begin.[185] The other eight cases occurred in the few jurisdictions that do not provide for defense discovery of the identity of government witnesses before trial.[186]

In keeping with the *Holloway* standard, all courts should require defense discovery of the identity of prosecution witnesses at the earliest feasi-

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182. Respondents were asked: "If a conflict of interest has not been discovered until the trial stage of a case, do the courts in your jurisdiction routinely grant a continuance to allow your organization to withdraw and allow new counsel to prepare the case?"

183. For example, a staff attorney in the Federal Public Defender program in Chicago commented that the federal courts in Chicago granted continuances for the appointment of new counsel at trial "provided the court is satisfied that the conflict was only recently discovered and is not being used as a delaying tactic." Questionnaire response of Federal Public Defender, Chicago (1977) (on file with author).

184. *See* People v. Grigsby, 47 Ill. App. 3d 812, 815, 365 N.E.2d 481, 482 (1977).

185. *See* State v. Means, 268 N.W.2d 802, 813 (S.D. 1978).

186. Six of the eight cases were federal court prosecutions. The Jencks Act prohibits disclosure of the pretrial statements of government witnesses in the federal courts before those witnesses have testified on direct examination at trial. 18 U.S.C.A. § 3500(a) (West Supp. 1983). In addition, the Federal Rules of Criminal Procedure make no provision for the pre-trial disclosure of the identity of government witnesses, except in very limited circumstances. *See* FED. R. CRIM. P. 12.1(b).

One of the two state court prosecutions, State v. Franklin, 400 So. 2d 616 (La. 1981), occurred in Louisiana, which prohibits almost all pretrial discovery by the defense. *See* State v. Rose, 271 So. 2d 863, 865-66 (La. 1973); Comment, *Criminal Discovery in Louisiana—"The Defense is Not Entitled,"* 23 LOY. L. REV. 440, 454-55 (1977). The other case, Theodore v. New Hampshire, 614 F.2d 817 (1st Cir. 1980), was a New Hampshire state prosecution that resulted in a federal habeas corpus petition. In New Hampshire, only defendants in capital cases are entitled to pre-trial disclosure of prosecution witnesses, and even then only twenty-four hours before trial. N.H. REV. STAT. ANN. § 604:1 (1974); *see* State v. Schena, 110 N.H. 73, 74, 260 A.2d 93, 94 (1969) (court's denial of motion to compel disclosure of names of state's witnesses not an abuse of discretion).

ble time to avoid motions for the appointment or substitution of independent counsel during trial.[187] Such early discovery squarely places the responsibility for identifying and avoiding potential conflicts of interest before trial on defense counsel.[188] If the defense knows the identity of all prosecution witnesses well in advance of trial, only an unanticipated rebuttal witness would excuse a tardy motion to withdraw.[189]

3. *Requiring Disclosure of the Factual Basis of an Alleged Conflict of Interest*

Although a defense lawyer's motion to withdraw alerts a trial court that a conflict of interest may impair the defendant's Sixth Amendment right to counsel, *Holloway* does not require the court to grant the motion. An alternative is for the court to "take adequate steps" to assure that the possibility of conflict is "remote."[190] *Holloway* does not articulate what those "adequate steps" might be, but two possibilities exist in cases involving the cross-examination of former clients. First, the trial judge may request the defense lawyer to disclose the basis of the potential conflict of interest, so that the court may determine if the possibility is "remote." Second, the court may ask the witness to consent to counsel's continued participation in the case.

Disclosing the factual basis for an alleged conflict may avoid a costly continuance or mistrial when counsel's motion is tardy, since the disclosure might show that there is little chance of a conflict of interest. Required disclosure, however, may force counsel to reveal client confidences

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187. Early discovery of prosecution witness names is also desirable for reasons beyond the scope of this paper. *See* S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE, CASES AND COMMENTARY 759-60 n.22 (1980) (disclosure necessary to refresh defendant's memory regarding transaction, and to enable effective cross-examination by defense counsel); Rooney & Evans, *Let's Rethink the Jencks Act and Federal Criminal Discovery*, 62 A.B.A. J. 1313 (1976) (fears of increased perjury resulting from liberal discovery are unfounded).

188. The prosecutor may not want to disclose the identity of a particular witness before trial for the witness's own protection. This is the major rationale for the federal rule. *See* S. SALTZBURG, *supra* note 187, at 757-59. If the prosecutor does not disclose the identity of a particular witness or witnesses before trial, for this or any other reason, it should be the *prosecutor's* obligation to ascertain from the witness whether the witness has had a prior lawyer-client relationship with defense counsel.

189. Discovery rules sometimes distinguish rebuttal witnesses from other prospective witnesses. For example, the ABA Standards require the prosecution to disclose before trial the names and addresses of all witnesses it intends to call as part of its case-in-chief; rebuttal witnesses are implicitly excluded from the requirement. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 2.1(a)(i) (Approved Draft 1970). Discovery laws in several states include similar provisions. *See, e.g.*, ARIZ. R. CRIM. P. 15.1(a)(1); ILL. ANN. STAT. ch. 110A, § 412(a)(i)(Smith-Hurd 1976); MINN. R. CRIM. P. 9.01(1); TENN. CODE ANN. §§ 40-13-107, 40-17-106 (1982). *But cf.* FLA. R. CRIM. P. 3.220(e) (1973) (prosecutor shall provide to defense "a list of all witnesses known to the prosecuting attorney to have information which may be relevant to the offense charged, and to any defense of the person charged with respect thereto").

190. Holloway v. Arkansas, 435 U.S. 475, 484 (1978).

or other information he obtained in his fiduciary role. This dilemma is particularly acute if the disclosure includes information concerning criminal wrongdoing by either the witness[191] or the defendant.[192] Arguably, such an intrusion into the lawyer-client relationship may itself impair the defendant's right to effective assistance of counsel.[193]

Holloway recognized the substantial risks in requiring disclosure. Although the Court did not "preclude" a trial judge from "exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interests,"[194] it recognized that "[s]uch compelled disclosure creates significant risks of unfair prejudice, especially when the disclosure is to a judge who may be called upon later to impose sentences" for one or more of the affected clients.[195] *Holloway* declined to examine the issue further, however, stating that: "This case does not require an inquiry into the extent of a court's power to compel an attorney to disclose confidential communications that he concludes would be damaging to his client."[196]

The issue left unresolved by *Holloway* has divided lower courts. In California, a trial court cannot require defense counsel to disclose any of the underlying bases of a claimed conflict of interest and must grant a motion for separate counsel on the strength of counsel's averment.[197] The Califor-

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191. One appellate court suggested that if defense counsel discloses criminal conduct by the witness, the trial judge would be obligated to report it to the proper authorities. *See* People v. Grigsby, 47 Ill. App. 3d 812, 819 n.1, 365 N.E.2d 481, 486 n.1 (1977).

192. *See* Holloway v. Arkansas, 435 U.S. 475, 487 n.11 (1978).

193. *See* Uhl v. Municipal Court, 37 Cal. App. 3d 526, 528, 112 Cal. Rptr. 478, 479 (1974).

If the defense lawyer refuses to disclose the specific factual basis of the alleged conflict of interest and the trial court denies the motion for separate counsel, there is a substantial risk of reversal. Brooks v. Hopper, 597 F.2d 57 (5th Cir. 1979), a joint representation case, illustrates this risk. A court-appointed attorney represented three co-defendants on a robbery charge. The lawyer informed the court before trial that a conflict of interest had developed and requested separate counsel for each defendant. When the lawyer refused to explain the conflict on the ground of attorney-client privilege, the court denied the motion. The first two defendants testified at trial and denied their guilt. The third defendant then testified that one of his co-defendants had confessed to him responsibility for the robbery. Not surprisingly, the Fifth Circuit held that the lawyer could not argue the case effectively for each of his clients. 597 F.2d at 59.

194. Holloway v. Arkansas, 453 U.S. 475, 487 (1978).

195. *Id.* at 487 n.11. At another point the opinion noted that defense counsel might not have presented his requests for separate counsel in greater detail because he was "confronted with a risk of violating, by more disclosure, his duty of confidentiality to his clients." *Id.* at 485.

196. *Id.* at 487 n.11.

197. In Uhl v. Municipal Court, 37 Cal. App. 3d 526, 112 Cal. Rptr. 478 (1974), a public defender informed the trial judge that the defendant had a conflict of interest with another public defender client, but counsel refused to disclose even the identity of the second client. When the trial court declined to require any further disclosure and agreed to appoint separate counsel to represent the defendant, the prosecution sought interlocutory relief in the California Court of Appeal, arguing that the trial court should not appoint independent counsel without a specific showing of conflict of interest. The appellate court affirmed, concluding that any disclosure, over counsel's objection, would violate the defendant's "right to untrammeled and unimpaired assistance of counsel guaranteed by the state and federal Constitutions and its necessary corollary, the confidentiality of the attorney-client relationship, the Canons of Ethics and the applicable California law." *Id.* at 528, 112 Cal. Rptr. at 479. Each of the twelve California public defender offices responding to the survey described in Part II reported that motions for appointment of independent counsel are always granted without the disclosure of the underlying facts.

nia approach allows an attorney to fulfill his fiduciary obligations to each client, but does not prevent a lawyer from filing a spurious motion to cause a delay or mistrial.[198] Such concerns have caused courts in a few jurisdictions to refuse to appoint independent counsel for a defendant unless the lawyer seeking to withdraw can substantiate the claimed conflict of interest.[199]

The national survey of public defender offices described in Part II of this Article sheds some light on the actual practices of trial courts in requiring disclosure of the factual bases of alleged conflicts of interest.[200] As indicated in Table Five, 65% of the respondents indicated that they are permitted to withdraw from cases without any required disclosure of the underlying facts constituting the conflict.[201] The other 35% stated that they are required to substantiate motions for the appointment of independent counsel by revealing the factual bases of conflicts of interest. Of the twenty-three offices in this category, however, seven reported that disclosure is required only occasionally. In addition, sixteen of the twenty-three offices indicated that they are permitted to avoid ethical problems by stating the nature of antagonistic client interests without revealing confidential information. Only seven offices indicated that required disclosure intrudes upon attorney-client relations or that courts sometimes do not accept vague descriptions of the factual bases of asserted conflicts.

4. *Proposed Standards for Reviewing a Motion to Withdraw*

When the timing of a motion to withdraw is considered with the disclosure issue, it is possible to draw certain conclusions from the survey and the case law. First, trial courts rarely deny a motion for the substitution of counsel or require the defense lawyer to disclose the factual basis for the motion when counsel raises the issue sufficiently in advance of trial to avoid substantial problems of delay, inconvenience for witnesses, or interference with the smooth operation of the court calendar. This judicial

198. Justice Powell forecast this problem in his *Holloway* dissent, commenting that "the path may have been cleared for potentially disruptive demands for separate counsel predicated solely on the representations of defense counsel." 435 U.S. at 493 (Powell, J., dissenting).

199. *See* United States v. Jeffers, 520 F.2d 1256 (7th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976); State v. Baker, 288 So. 2d 52 (La. 1973).

200. Sixty-six public defender offices responded to the question: "Do the courts in your jurisdiction require you to state the factual basis of a conflict of interest before allowing you to withdraw from the representation of a client?" The sixty-six organizations included the public defender offices in four California counties: Alameda, Contra Costa, Marin, and Santa Clara. Although these agencies did not participate in the national survey, the author interviewed the chief attorney in each of these organizations in December, 1976. Their verbal responses have been tallied along with the written responses of survey respondents in Table Five.

201. This figure includes the twelve California counties who reported that they follow the rule in Uhl v. Municipal Court, 37 Cal. App. 3d 526, 112 Cal. Rptr. 478 (1974).

TABLE FIVE

PUBLIC DEFENDER REPORTS OF REQUIRED DISCLOSURE

Policy	Number of Offices	Percentage of Offices Responding to Question
No Disclosure Required	43	65
Required to State Conflict in General Terms	16	24
Required to State Specific Basis of Conflict	7	11
Total	66	100

deference is consistent with the Supreme Court's observation that trial courts should respect the timely declarations of lawyers, as officers of the court, regarding their ethical obligations in representing client interests.[202] Timely pre-trial withdrawal motions should *always* be granted without question. The only reason for intruding into the privacy of the lawyer-client relationship in such a case would be concern over the expense of appointing independent counsel. This reason is not only inapposite in cases in which the defendant can afford to retain counsel, but also seems insufficient to require disclosure when new counsel must be paid at public expense, in view of the risks of revealing client confidences.

When a motion to withdraw based on an alleged conflict of interest is made at trial, concerns over efficient judicial administration may sometimes justify an inquiry to determine whether the risk of conflict of interest is "remote." However, those jurisdictions having discovery rules requiring the prosecution to disclose the identity of the witness before trial rarely experience problems with untimely motions for substituted counsel based on a witness-defendant conflict. A change in the discovery rules of the federal courts, and of a few states, thus would minimize disclosure problems in successive representation cases.

It is still possible to avoid violations of the attorney-client privilege even if counsel files an untimely withdrawal motion.[203] When a motion is not

202. Holloway v. Arkansas, 435 U.S. 475, 485-86 (1978).

203. Reformed discovery rules requiring pretrial defense discovery of the identity of prosecution

registered before trial, most judges still do not require a detailed factual demonstration of the underlying conflict of interest. Defense counsel often can outline the conflict without revealing the confidences or secrets of either client. A declaration, for example, that the defense lawyer previously represented the prosecution witness in an earlier criminal case and that the inducements for the former client's guilty plea in that case will be a proper subject for cross-examination, should satisfy the trial court while not revealing specific matters of confidential information.[204]

More detailed disclosure rarely should be necessary. However, if counsel's generalized statement fails to satisfy the court of the need to delay or abort trial, other alternatives exist. During his tenure on the Seventh Circuit Court of Appeals, Justice Stevens suggested an *in camera* disclosure by defense counsel to the trial judge, outlining the factual basis for an alleged conflict of interest, to provide "adequate protection to the interests at stake."[205] Presumably such a proceeding would be ex parte, to minimize the detrimental effects of disclosing client secrets. A survey respondent reported that the courts in his jurisdiction sometimes have required an ex parte *in camera* disclosure to a judge other than the judge who is presiding over the defendant's trial.[206]

A number of courts and commentators, however, have rejected the *in camera* disclosure approach, contending that *any* disclosure of client confidences, even to a judge *in camera*, impermissibly impairs the lawyer-client privilege.[207] To alleviate this concern, courts could employ the "substantial relationship" formulation of the civil disqualification case law. Counsel's statement, for example, that he previously represented the witness in a companion prosecution based on the same events or transactions

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witnesses would affect only those motions to withdraw which are based on a conflict between the defendant and a prosecution witness. It would have no bearing on the timing of motions for separate counsel based on other types of conflict of interest, such as that between jointly represented co-defendants. Moreover, it appears unlikely that discovery reform will occur in the federal courts in the near future, since Congress recently rejected this change in Rule 16 of the Federal Rules of Criminal Procedure, although the rule had been approved by the Supreme Court. *See* S. SALTZBURG, *supra* note 187, at 757–59.

204. Justice Powell's dissenting opinion in *Holloway* argued that trial courts should normally be able to conduct inquiries into the existence of conflicts of interest and counsel should normally be able to state the basis of a conflict in concrete terms without violating client confidences. 435 U.S. at 493 n.1 (Powell, J., dissenting).

205. United States v. Jeffers, 520 F.2d 1256, 1265 (7th Cir. 1975) (Stevens, J.), *cert. denied*, 423 U.S. 1066 (1976).

206. Survey response of the Clark County [Las Vegas] Public Defender (1977) (on file with author). This variation avoids a disclosure of potentially detrimental information to the judge who may later be sentencing the defendant.

207. *See* T.C. Theatre Corp. v. Warner Bros. Pictures, Inc., 113 F. Supp. 265, 269 (S.D.N.Y. 1953); People v. Grigsby, 47 Ill. App. 3d 812, 819 n.1, 365 N.E.2d 481, 486 n.1 (1977); Note, *Attorney's Conflict of Interests: Representation of Interest Adverse to that of Former Client*, 55 B.U.L. REV. 61, 76 (1975); Note, *Disqualification of Attorneys for Representing Interests Adverse to Former Clients*, 64 YALE L.J. 917, 926 (1955).

as those in the defendant's case should require the granting of a motion to withdraw without further investigation by the court. Indeed, it appears that many courts already follow a modified form of the substantial relationship test by permitting counsel to make only a general statement of the underlying conflict of interest.

5. *Waiver or Consent by the Witness*

Even when there is a substantial relationship between the defense lawyer's earlier representation of a prosecution witness and the issues to be raised in cross-examination, some courts have denied counsel's motion to withdraw on the basis of the witness's waiver or consent.[208] The rationale is that once a witness consents to the defense lawyer's revealing the witness's confidences or secrets, counsel no longer is impaired in cross-examination, and, as a result, Sixth Amendment problems are eliminated. Case law on this issue, however, is unsettled. The distinction between the evidentiary lawyer-client privilege and counsel's broader ethical obligation to preserve confidential client information has proved to be particularly confusing for several lower courts and commentators.[209] Although a few courts have held that a witness's waiver of his attorney-client privilege justifies denying counsel's motion to withdraw,[210] this result ignores the substantial conflict of interest problems that continue even after a waiver of the evidentiary privilege.

The *Model Code of Professional Responsibility* requires lawyers to preserve both "confidences" and "secrets" of a client.[211] Disciplinary Rule DR 4-101(A) distinguishes between the two concepts by noting that "confidences" refer to information protected by the attorney-client privilege while "secrets" include "other information gained in the professional relationship . . . the disclosure of which would be embarrassing or . . . detrimental to the client."[212] In criminal cases, therefore, the lawyer must preserve not only the communications made to him by the former client, but also such matters in the former client's file as arrest reports, probation reports, and psychiatric studies.

The bar has treated the lawyer's obligation to preserve confidential information as far broader than the evidentiary privilege: "This ethical pre-

208. *See* Theodore v. New Hampshire, 614 F.2d 817, 822 (1st Cir. 1980); United States v. Partin, 601 F.2d 1000, 1007 (9th Cir. 1979); United States *ex rel.* Means v. Solem, 457 F. Supp. 1256, 1272 (D.S.D. 1978).

209. *See Developments*, *supra* note 72, at 1315.

210. *See* State v. Means, 268 N.W.2d 802, 813 (S.D. 1978).

211. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).

212. *Id.* DR 4-101(A). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 comment (1983) (confidentiality rule applies to all information relating to representation regardless of its source).

cept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge."[213] The bar adopted this broad concept of confidentiality because much of the lawyer's information about a client usually comes from sources other than the client. Criminal defense attorneys acquire substantial information about clients from discovery, witness interviews, and probation officers preparing pre-sentence investigation reports. Since counsel acquires this information in a fiduciary capacity, a waiver of the evidentiary privilege deals only with the tip of the iceberg.

A trial judge might look beyond the narrow evidentiary privilege and ask a witness to consent to the defense lawyer's use of *any* information acquired during the earlier representation.[214] Although this approach may be appropriate in some instances, in other cases there is a serious question of whether a former client's consent, even if informed and unambiguous, can justify a trial court's denial of defense counsel's motion to withdraw. Both the *Model Code of Professional Responsibility* and the proposed *Model Rules of Professional Conduct* distinguish between a lawyer's *disclosing* confidential information and his using that information against the client.[215] For example, DR 4-101(C)(1) of the *Code* permits a lawyer to "reveal" the confidences or secrets of a client with the client's informed consent.[216] On the other hand, DR 4-101(B) prohibits a lawyer both from revealing confidential information and from "us[ing] a confidence or secret . . . to the disadvantage of the client."[217] Therefore, although a client may permit a lawyer to reveal confidential information, the lawyer cannot—even with consent—use a client's secrets against the client. The distinction reflects an acknowledgement in the *Code* that a lawyer's use of confidential information to the detriment of a client, when that information was acquired as a result of the client's trust and confidence, is a more

213. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-4 (1981).

214. *See, e.g.*, United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978) (absence of waiver of "conflict of interest"); United States v. FMC Corp., 495 F. Supp. 172, 175 (E.D. Pa. 1980) (waiver of privilege and "any rights of confidentiality").

Some courts have followed this approach without any analysis or attempt to ascertain if the witness understands what is at stake. *See* Theodore v. New Hampshire, 614 F.2d 817, 822 (1st Cir. 1980). This approach to obtaining the consent of the former client is markedly different from the courts' treatment of the consent issue in civil disqualification cases. To be effective in a civil action, a former client's consent must be informed. First Wis. Mortgage Trust v. First Wis. Corp., 422 F. Supp. 493, 496 (E.D. Wis. 1976). Counsel in civil cases must disclose to the former client the legal implications of any future conflict of interest. E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 400 (S.D. Tex. 1969). The consent must also be unambiguous; any doubts about whether a knowing decision actually was made by the former client have been resolved against the existence of a valid consent. IBM Corp. v. Levin, 579 F.2d 271, 282 (3d Cir. 1978); Emle Indus. v. Patentex, Inc., 478 F.2d 562, 573-74 (2d Cir. 1973).

215. *See* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-5 (1981); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983).

216. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(1) (1981).

217. *Id.* DR 4-101(b)(2).

serious breach of professional responsibility than merely revealing confidences or secrets.

This rationale arguably does not apply in criminal cases since the witness is not a party to the litigation and does not have an actual stake in the outcome. Therefore, using particular information during cross-examination of the witness technically is not using the information to the "disadvantage" of the witness. In a broader sense, however, the distinction between revealing confidential information and using it against the client makes great sense in the criminal litigation cross-examination context. When the lawyer's purpose is to attack the credibility of the witness, the use of information acquired from a probation or police report can be both humiliating to the witness and degrading to the witness's former lawyer. A policy that precludes a witness's consent, after defense counsel has informed the court that he possesses such confidential information and moves to withdraw from the case, is quite reasonable.[218]

Protection of the defendant's interest is another reason to question the validity of a witness's purported consent. Regardless of the witness's consent, the lawyer may feel uncomfortable in conducting cross-examination,[219] and this discomfort may be communicated subtly to the trier of fact. Of course, another lawyer may not be able to acquire the information in question, but to the extent that substitute counsel can learn the information from independent sources, that lawyer may be a better advocate for the defendant.[220]

It is not suggested here that a prosecution witness's consent to his former lawyer's representation of a defendant is never valid. On the contrary, such consent may be effective even when a substantial relationship exists between the former representation and the contested issues in the defendant's case. An important distinction should be drawn between a conflict of interest premised on a substantial relationship between two client representations, and a conflict that occurs when counsel informs the court that he in fact possesses information from the earlier representation that would be useful in challenging the witness's credibility. Since the former situation results in ethical problems primarily because of an appearance of impropriety, the witness should be permitted to consent to the

218. Rule 1.9 of the *Model Rules* is instructive in this regard. Rule 1.9(a) prohibits successive representation when the two client matters are substantially related. Rule 1.9(b) prohibits the use of confidential information to the disadvantage of a former client. The comment to the rule makes clear that the prohibition against successive representation can be waived by the former client. However, the comment also reiterates the prohibition of Rule 1.6 against using confidential information to the disadvantage of the client, without any reference to the client's consent or waiver. *Model Rules of Professional Conduct* Rule 1.9 comment.

219. *See* United States v. Martinez, 630 F.2d 361, 362 (5th Cir. 1980).

220. *See* United States v. Morando, 628 F.2d 535, 536 (9th Cir. 1980).

lawyer's continuation in the case. On the other hand, effective representation of the defendant in the latter situation may require the lawyer to use the information in question against the witness—precisely the circumstances in which the bar's ethical rules preclude a former client's consent.

Witness consent issues also arise in cases in which the government moves to disqualify defense counsel. The disqualification cases raise the question of the validity of the defendant's consent to counsel's continued participation in the case, as well as the defendant's purported waiver of his right to effective representation. Those issues are discussed in the following section.

C. *Prosecution Moves to Disqualify Defense Counsel*

> The government moves before trial to disqualify defense counsel from representing Joe, the defendant in a major prosecution. The prosecution attorney alleges that there is a conflict of interest between Joe and Sue, who is a prospective witness for the government and a former client of defense counsel. Joe's lawyer opposes the motion, and Joe states that he is willing to waive his right to an attorney who is unimpaired by a conflict of interest. Sue informs the court that she has no objection to the lawyer representing Joe, but Sue does not waive her attorney-client privilege.

This illustration raises one of the most difficult procedural issues in criminal cases: the extent to which a court may interfere with a defendant's choice of counsel. Courts deciding disqualification motions in civil cases often emphasize the current client's right to chosen counsel.[221] That right has a constitutional dimension in a criminal prosecution; the Sixth Amendment guarantees a defendant the right to retain the lawyer of his choice without unnecessary governmental interference.[222] Even when the court appoints counsel for an indigent defendant, it cannot discharge the lawyer over the defendant's objection absent compelling justification.[223]

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221. *See* Hull v. Celanese Corp., 513 F.2d 568, 572 (2d Cir. 1975).

222. *See, e.g.*, United States v. Cox, 580 F.2d 317, 321 (8th Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979); Magee v. Superior Court, 8 Cal. 3d 949, 950, 506 P.2d 1023, 1025 (1973).

223. *See* Smith v. Superior Court, 68 Cal. 2d 547, 440 P.2d 65 (1968). *Smith* has not been overruled by the Court's recent decision in Morris v. Slappy, 103 S. Ct. 1610 (1983). Slappy was represented initially by Goldfine, a deputy public defender who was hospitalized for surgery shortly before trial. The court appointed Hotchkiss to replace Goldfine six days before trial. Slappy requested a continuance on each of the first two days of trial, alleging that Hotchkiss was not yet prepared, although Slappy did not object to the appointment of Hotchkiss to represent him. The court denied the continuance after Hotchkiss stated that in fact he was prepared to proceed. Five days into the trial, Slappy informed the court that he would not cooperate with Hotchkiss since he regarded Goldfine as his attorney. Slappy's conviction was affirmed by the state courts and the federal district court denied habeas corpus relief. The Ninth Circuit reversed, however, holding that the trial court did not balance the defendant's interest in continuing with his appointed counsel with the state's

Nevertheless, the courts have often granted prosecution motions to disqualify defense counsel in recent years,[224] and some courts have disqualified lawyers on their own initiative.[225] Since it is widely recognized that the defendant's right to the counsel of his choice is not absolute, the propriety of a disqualification depends on the circumstances of each case and an analysis of the competing interests at stake. In the example introducing this section, does the government have an interest in disqualification sufficient to compel a disruption of the lawyer-client relationship when neither Joe nor Sue objects to defense counsel's participation in the case? Can Sue's confidentiality interest be protected adequately if the motion is denied? What are the costs of disqualification to both Joe and his lawyer? If Joe can waive his right to conflict-free counsel, must the court accept the waiver and deny the motion? Finally, are there questions of public interest that the court should consider in addition to the interests of Joe and Sue?

1. *The Government's Interest in Seeking Disqualification*

The frequency of prosecution motions to disqualify criminal defense lawyers has increased dramatically in recent years.[226] Although motions to disqualify lawyers from representing multiple grand jury witnesses have led to substantial controversy,[227] little attention has been paid to the rapid

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interest in judicial efficiency, and thus violated the defendant's right to counsel. Slappy v. Morris, 649 F. 2d 718, 722 (9th Cir. 1981), *rev'd*, 103 S. Ct. 1610 (1983).

The Supreme Court reversed, holding that the record did not support the Ninth Circuit's conclusion that Slappy had made a timely, good-faith request to continue with Goldfine. In sweeping dicta, Chief Justice Burger's opinion for the Court rejected the claim "that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel." 103 S. Ct. at 1617 (footnote omitted). Although concurring in the Court's judgment, four Justices objected to the dicta. Justice Brennan's concurring opinion emphasized the wisdom of decisions like *Smith*, and argued that the Sixth Amendment should recognize the defendant's interest in preserving his relationship with a particular attorney. 103 S. Ct. at 1621 (Brennan, J., concurring).

Slappy is not authority for the proposition that the Sixth Amendment right to counsel allows the state to arbitrarily discharge a defendant's lawyer over the defendant's timely objection. Although the Constitution does not guarantee attorney-client "rapport," 103 S. Ct. at 1617, nothing could strike a greater blow to the concept of effective representation than a ruling that permits the state to remove a defendant's lawyer without compelling justification.

224. *See infra* pp. 53–54.

225. *See* Coffelt v. Shell, 577 F.2d 30 (8th Cir. 1978); United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978).

226. A major cause of this development has been the expanded use of the grand jury as a vehicle for investigating organized crime and white-collar offenses. A single lawyer or firm sometimes represents several grand jury witnesses to maintain a common defense strategy against the government's efforts to investigate and prosecute the witnesses for suspected criminal offenses. The government, in turn, may seek disqualification to break the joint representation and negotiate with one or more suspects to testify against the others. *See, e.g.*, *In re* Gopman, 531 F.2d 262 (5th Cir. 1976); Pirillo v. Takiff, 462 Pa. 511, 341 A.2d 896 (1975), *aff'd per curiam on rehearing*, 466 Pa. 187, 352 A.2d 11, *cert. denied*, 423 U.S. 1083 (1976).

227. *See* Lepone, *Multiple Representation and Government Intrusion into the Attorney-Client Relationship in Grand Jury Proceedings*, 53 TEMP. L.Q. 1147 (1980); Moore, *Disqualification of an*

increase in prosecutors' disqualification motions to prevent defense lawyers from cross-examining former clients at trial. Such motions were virtually nonexistent a decade ago.[228] Recently, however, several appellate court decisions each year have dealt with the issue, with little consistency in the outcome of cases, and no analysis of the government's interest in seeking disqualification.[229]

Why should the government be permitted to challenge defense counsel's participation in a case when the defendant desires to have the lawyer continue, especially when the prosecution's own witness has no objection to his former lawyer representing the defendant?[230] Disqualification motions may be rationalized by a need to protect the witness's interest, regardless of the witness's desire, or to further the public interest in a fair trial or an ethical bar. Each of these rationales will be analyzed below. First, however, it is appropriate to consider the tactical motivations behind some disqualification motions.

Disqualification motions in civil litigation are often motivated by questionable tactics rather than a true concern for clients' confidentiality.[231] The elimination from a case of a formidable lawyer or firm as counsel for an adversary can place the adversary at a competitive disadvantage.[232] A disqualification of counsel also can substantially increase an adversary's costs and thereby induce a favorable settlement.[233] As a result, some courts apply a stricter scrutiny than that of the substantial relationship test to

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Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense, 27 U.C.L.A. L. REV. 1 (1979); Note, *Supervising Multiple Representation of Grand Jury Witnesses*, 57 B.U.L. REV. 544 (1977).

228. The first appellate court decisions concerning prosecution motions to disqualify defense counsel based on alleged conflicts with former clients testifying for the government may have occurred no earlier than 1975. *See* United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

229. *See, e.g.*, United States v. Curcio, 680 F.2d 881 (2d Cir. 1982); United States v. Shepard, 675 F.2d 977 (8th Cir. 1982); United States v. Agosto, 675 F.2d 965 (8th Cir. 1982); United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982); United States v. Greger, 657 F.2d 1109 (9th Cir. 1981); United States v. Smith, 653 F.2d 126 (4th Cir. 1981); Davis v. Stamler, 650 F.2d 477 (3d Cir. 1981).

230. For an example of these circumstances, see United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982).

231. *See* Allegaert v. Perot, 565 F.2d 246, 251 (2d Cir. 1977); Woods v. Covington County Bank, 537 F.2d 804, 813 (5th Cir. 1976); Lefrak v. Arabian Am. Oil Co., 527 F.2d 1136, 1138-39 (2d Cir. 1975); J.P. Foley & Co. v. Vanderbilt, 523 F.2d 1357, 1359 (2d Cir. 1975) (Gurfein, J., concurring); Altschul v. Paine Webber, Inc., 488 F. Supp. 858, 861 (S.D.N.Y. 1980); Society for Goodwill to Retarded Children v. Carey, 466 F. Supp. 722 (E.D.N.Y. 1979); *see also* Liebman, *The Changing Law of Disqualification: The Role of Presumption and Policy*, 73 NW. U.L. REV. 996, 1015 (1979); Shadur, *Lawyers' Conflicts of Interest: An Overview*, 1977 CHI. B. REC. 190, 191; Comment, *The Ethics of Moving to Disqualify Opposing Counsel for Conflict of Interest*, 1979 DUKE L.J. 1310, 1316-17.

232. *See* Huffman, *Conflicts, Disqualifications Cause Persistent Headaches*, Legal Times of Washington, May 5, 1980, at 8, col. 2.

233. *Id.*

such motions to avoid disqualifications made solely or primarily for tactical advantage.[234]

There are reasons to believe that some motions to disqualify counsel in criminal cases are also filed for tactical advantage rather than the protection of confidential information on behalf of a former client of defense counsel. In *United States v. Cunningham*,[235] for example, the government moved to disqualify a lawyer who had represented the defendant for over six years in related matters, had succeeded in having four previous indictments against Cunningham dismissed, and had successfully represented the defendant before the United States Supreme Court. The former client refused to join the government's disqualification motion, and naturally the defendant himself desired that his repeatedly successful lawyer continue to represent him. Since the lawyer's earlier representation of the government witness had been quite limited in scope,[236] the defendant did not derive an unfair advantage from the alleged conflict. In short, it is difficult to view the government's motion in *Cunningham* as anything but an attempt to rid itself of a highly successful lawyer and to harass a defendant who had repeatedly escaped unscathed from prior attempts to prosecute him.

Another tactical purpose for disqualification motions in criminal cases is to prevent a witness from becoming sympathetic to the defense. Litigators have long been aware that when a witness identifies with one party or another and understands how his testimony fits into his side's evidentiary case, he is likely to slant his version of the facts to further the case.[237] Psychological battles for the allegiance of a neutral witness are common.[238] When a government witness is a former client of defense counsel, the prosecutor may face an uphill battle to secure the witness's favor. Disqualification of counsel can ease the prosecutor's burden.

The notion that a witness's allegiance can color his testimony is troublesome for an adjudicatory system that places a premium on accuracy and fairness in reconstructing events and transactions.[239] Even more troubling, however, is the fact that a defendant's lawyer-client relationship can be severed as a result of such questionable tactics. Unfortunately, a trial judge deciding whether to disqualify counsel can never be certain if any tactics of this nature lurk behind an otherwise colorable disqualifica-

234. *See* Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).
235. 672 F.2d 1064 (2d Cir. 1982).
236. *Id.* at 1067, 1073.
237. *See* A. MORRILL, TRIAL DIPLOMACY 172 (2d ed. 1982).
238. *See* R. SIMMONS, WINNING BEFORE TRIAL: HOW TO PREPARE CASES FOR THE BEST SETTLEMENT OR TRIAL RESULT 305-13 (1974).
239. For an interesting discussion of this subject, see G. BELLOW & B. MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY 391-92, 412-15 (1978).

tion motion. What the judge can do, however, is make certain that the government's *legitimate* interest in seeking disqualification is strong.

When the former client of defense counsel testifying for the government desires disqualification to preserve confidential information, the government's interest in seeking disqualification seems strongest.[240] Unlike a party in a civil action, the prosecution witness usually is not represented by counsel, and the government lawyer should qualify as a reasonable surrogate for purposes of the disqualification motion. The government also has a strong interest in seeking disqualification when defense counsel is a former prosecutor who participated in related government investigations of the defendant.[241] In this case, the government itself is in a sense the former client of defense counsel, and the prosecution may well be justified in seeking to protect the integrity of its own investigation process and to prevent an unfair advantage for the defense at trial. Absent these special circumstances, the prosecution should shoulder a heavy burden to demonstrate that either the witness's interest in confidentiality or the public's interest in a fair trial support disqualification.

2. *The Former Client's Interest in Disqualification*

The prosecution witness's desire to keep confidential all information acquired during a prior representation is an important factor for the court to weigh in determining whether to disqualify counsel.[242] Yet it is also possible that the witness may not oppose counsel's representation of the defendant.[243] Unfortunately, the courts frequently decide disqualification matters in criminal cases without taking the witness's position into account.[244]

The witness's opposition to defense counsel's representation of the defendant is especially important in those cases in which the court finds a substantial relationship between the earlier representation and the defendant's case.[245] The risk that counsel acquired confidential information

240. *See* United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978).

241. *See* United States v. Ostrer, 597 F.2d 337 (2d Cir. 1979); United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979); People v. Hoskins, 392 N.E.2d 405 (Ill. App. Ct. 1979); People v. Horton, 391 N.E.2d 498 (Ill. App. Ct. 1979). If the defense lawyer was formerly employed as a prosecutor and in that capacity prosecuted the defendant on an *unrelated* charge, disqualification will be denied. *See* United States v. Smith, 653 F.2d 126, 128 (4th Cir. 1981); People v. Franklin, 75 Ill. 2d 173, 177–79, 387 N.E.2d 685, 687 (1979).

242. *See* United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978).

243. *See* United States v. Cunningham, 672 F.2d 1064, 1068 (2d Cir. 1982); United States v. FMC Corp., 495 F. Supp. 172, 175 (E.D. Pa. 1980).

244. *See, e.g.*, United States v. Shepard, 675 F.2d 977, 978–79 (8th Cir. 1982); United States v. Greger, 657 F.2d 1109, 1114–15 (9th Cir. 1981); United States v. Kitchin, 592 F.2d 900 (5th Cir. 1979); Commonwealth v. Connor, 410 N.E.2d 709 (Mass. 1980); State v. Morelli, 152 N.J. Super. 67, 377 A.2d 774 (N.J. 1977).

245. Some courts are beginning to apply the substantial relationship terminology from the civil disqualification cases to situations in which the government moves to disqualify defense counsel in criminal cases. *See* United States v. Agosto, 675 F.2d 965, 971–72 (8th Cir. 1982).

useful for cross-examination is especially great in these circumstances. Even though the defendant may be willing to waive his right to conflict-free representation, the waiver should not be given effect if there is a strong chance that the witness may be harmed by the conflict and he is unwilling to consent to counsel's participation in the case.[246] This situation is analogous to other circumstances in which a disability or lack of availability of defense counsel overrides a defendant's Sixth Amendment right to counsel of his choice.[247] On the other hand, if the relationship between the earlier representation and the foreseeable issues in the case before the court is not particularly strong, the risk of an ethical violation is small and the defendant's choice of counsel should prevail.[248] In addition, the court may be able, through measures short of disqualification, to minimize the danger that confidential information will be used improperly.[249]

A careful distinction should be drawn between a witness's refusal to agree to his former lawyer's representation of the defendant in a substantially related case and a witness's refusal to waive the attorney-client privilege. In the former situation, the witness is asserting his right to keep his lawyer from turning against him on a matter which he previously entrusted to his lawyer. However, the former client may not oppose the lawyer's representation of the defendant, but instead may merely wish to preserve the confidentiality of information the lawyer learned in the earlier representation. In the latter instance, the defendant's waiver of the conflict of interest may be effective if the court requires counsel to adhere to the witness's desire in cross-examination.[250]

In some cases the court may have to disqualify counsel even though the witness waives the attorney-client privilege and the defendant objects to disqualification. In *United States v. Siegner*,[251] the court found not only

246. *See* United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978).

247. *See, e.g.*, United States v. Wilhelm, 570 F.2d 461 (3d Cir. 1978) (defendant's counsel was not licensed by state to practice law); Bedrosian v. Mintz, 518 F.2d 396 (2d Cir. 1975) (indigent defendant required to accept counsel provided by state rather than counsel of his own choosing); United States *ex. rel.* Carey v. Rundle, 409 F.2d 1210 (3d Cir. 1969) (defendant must accept representation by public defender when counsel of choice not available at start of trial), *cert. denied*, 397 U.S. 946 (1970).

248. *But see* Commonwealth v. Connor, 410 N.E.2d 709 (Mass. 1980) (upholding trial court's holding that although defense counsel's prior representation of prosecution witness was unrelated, counsel disqualified).

249. *See infra* p. 63.

250. These were the circumstances in United States v. Cunningham, 672 F.2d 1064 (2d Cir. 1982), in which the Second Circuit ruled that the defendant could effectively waive conflict-free counsel so long as the lawyer restricted cross-examination to matters that were included in the public record. *Id.* at 1073. *See also* United States v. Armedo-Sarmiento, 524 F.2d 591 (2d Cir. 1975) (witnesses who were previous clients of defense counsel entitled to full protection of their privileged communications).

251. 498 F. Supp. 282 (E.D. Pa. 1980).

that defense counsel had represented an important prosecution witness on a related matter, but also that counsel actually received confidential information from the witness that would be essential for cross-examination.[252] Although the court did not discuss the question of whether the witness consented to the conflict, the witness's consent here would not have been dispositive. The court's disqualification of counsel was appropriate because the lawyer would have had to use the confidential information to the detriment of the witness. Disqualification in these circumstances reflects the bar's conflict-of-interest rules: A client or former client can consent to counsel's revealing confidential information, but not to the use of that information against the client himself.[253]

Protection of the witness's interest is sometimes dispositive of the disqualification issue because an actual conflict of interest is manifest to the trial court. This situation, however, rarely occurs. In most cases the court can only assess the risk that a conflict will occur because of the relationship between the two matters of client representation. This assessment should be based upon the substantial relationship principle applied in civil cases, and must include a balancing of the witness's interest with the defendant's due process rights and the public interest in a fair adversarial process. These considerations, and the relative weights to be accorded them in the balancing process, will be discussed in the following two sections.

3. *The Defendant's Interest in Keeping the Lawyer of his Choice*

To avoid disqualification of his counsel, the defendant may offer to waive his right to representation by a lawyer who is unimpaired by a conflict of interest.[254] The rationale is that if a defendant can waive the

252. *Id.* at 285.

253. *See supra* pp. 50–51.

Another case illustrates the applicability of the A.B.A.'s position that a client sometimes may not consent to a conflict of interest. In United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978), counsel represented co-defendants. One client pleaded guilty and then was called as a prosecution witness at the remaining client's trial even though he had not yet been sentenced. *Id.* at 1179. When the court stated that it believed there was a conflict of interest between the two clients, counsel replied that he would avoid the conflict by instructing the witness to exercise his Fifth Amendment privilege by not testifying about the facts of the case before his sentencing hearing. The court declared a mistrial and disqualified counsel from representing *both* clients. *Id.* at 1179–80. The Third Circuit affirmed, taking the position that a "waiver of the conflict of interest" could not cure the problem. *Id.* at 1184.

Dolan was correctly decided, because the potential ethical impropriety resulting from joint representation had ripened into an *actual* conflict of interest when one client became a prosecution witness. No matter what counsel did under the circumstances of the case, he would cause harm for one of his clients. If he proceeded to advise the witness to refuse to answer questions about the facts of the case, the witness's lack of cooperation with the government might jeopardize his position at the upcoming sentencing hearing, but permitting the witness to testify would jeopardize the defendant's opportunity for an acquittal.

254. *See* United States v. Curcio, 680 F.2d 881, 883 (2d Cir. 1982); United States v. Cunning-

right to counsel itself, he should also be able to waive the right to effective assistance of counsel, which is a component of the broader right.[255] Support for this argument can be found in *Faretta v. California*,[256] in which the Supreme Court recognized the right of a defendant to defend himself without the aid of counsel even though self-representation might be ineffective.[257] Applying this reasoning in *Holloway v. Arkansas*, the Court acknowledged that a defendant may waive the right to the assistance of an attorney unhindered by a conflict of interest.[258] However, the Court has not yet delineated the circumstances in which such a waiver may override a disqualification motion.[259]

Without Supreme Court guidance, the lower courts have taken divergent positions on the effectiveness of a defendant's waiver in overcoming a motion to disqualify counsel.[260] Yet within the apparently contradictory holdings, courts have often implicitly balanced the defendant's interest in keeping the lawyer of his choice with the other affected interests. When interests other than those of the defendant are weak, the defendant should ordinarily be permitted to waive a possible conflict of interest. These circumstances occur when the predominant purpose of a disqualification of counsel is to ensure that the defendant receives a fair trial. The defendant should be permitted to waive that guarantee, so long as the court determines that his decision is a knowing and voluntary one.[261]

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ham, 672 F.2d 1064, 1068–69 (2d Cir. 1982). If the defendant refuses to waive his right to a lawyer unimpaired by a conflict of interest, disqualification may be appropriate. *See* United States v. Greger, 657 F.2d 1109 (9th Cir. 1981).

255. *See* United States v. Mahar, 550 F.2d 1005, 1008 (5th Cir. 1977); United States v. Armedo-Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975).

256. 422 U.S. 806 (1975).

257. *Id.* at 834.

258. 435 U.S. 475, 483 n.5 (1978).

259. The Court declined to resolve the issue in *Holloway* because it was not argued that defendants had waived their right to conflict-free counsel. *Id.*

260. The Second Circuit reversed a district court order disqualifying defense counsel in a successive representation case, even though the trial court found that a substantial relationship existed and two former clients of defense counsel testifying for the government refused to waive their attorney-client privilege. United States v. Armedo-Sarmiento, 524 F.2d 591, 592 (2d Cir. 1975). The Second Circuit overturned the disqualification order because the trial court did not afford the defendant an opportunity to waive his right to conflict-free representation. *Id.* On the other hand, the Ninth Circuit refused to permit a defendant's waiver of effective representation because the prosecution witness refused to waive the conflict of interest. United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978). Without regard to the witness's position, other courts have found a purported waiver by the defendant invalid to overcome the appearance of impropriety. *See* Commonwealth v. Connor, 410 N.E.2d 709, 712–13 (Mass. 1980); State v. Morelli, 152 N.J. Super. 67, 70–74, 377 A.2d 774, 774–78 (1977). Finally, at least one appellate court has upheld a disqualification order over the defendant's objection, simply finding that there was no knowing and voluntary waiver, without any analysis of the issue. *See* Coffelt v. Shell, 577 F.2d 30, 31–32 (8th Cir. 1978).

261. For example, an attempt to disqualify counsel from the joint representation of co-defendants is normally not premised on the need to protect the confidences of a prosecution witness or the integrity of the fact-finding process, but rather on the risk that counsel's divided loyalty will harm the defendants themselves. Co-defendants in this situation therefore should be permitted to waive their right to conflict-free counsel. *See* United States v. Garcia, 517 F.2d 272 (5th Cir. 1975).

On the other hand, when protection of the confidentiality rights of a government witness is at stake or when the court concludes that the defense may acquire an unfair advantage from counsel's prior representation of a witness, the court should assess the strength of the defendant's interest in keeping his lawyer. The cost of disqualification for the defendant may vary considerably with each case. In addition, the court should consider the extent of the hardship that disqualification creates for defense counsel.

One factor affecting the cost of disqualification for both the defendant and counsel is the maturity of their attorney-client relationship. If the lawyer has represented the defendant on other occasions, and is familiar with the defendant's family and background as well as the circumstances of the defendant's prior contacts with the courts, disqualification of counsel is particularly costly to the defendant.[262] A longer association with counsel also allows for the development of confidence and rapport, two essential ingredients in a criminal defendant's relationship with his lawyer.[263]

Another factor affecting the cost of disqualification is the timing. Pretrial preparation may entail considerable effort and expense. Substitute counsel will find it necessary to duplicate many of the tasks undertaken by the disqualified lawyer, creating even greater expense for the defendant.[264] Of course, if the defendant is indigent, the public must bear the additional financial burden created by a disqualification of defense counsel. This also is a pertinent consideration for the court.[265]

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262. *See* United States v. Cunningham, 672 F.2d 1064, 1070-71 (2d Cir. 1982) (dismissal of counsel who represented defendant through six-year investigation could subject defendant to "real prejudice").

263. *See* 3 A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES 1-63 (1974).

264. When courts decide disqualification motions in civil cases, they often give substantial weight to the expense and inconvenience the disqualification motion causes the current client. *See* Board of Educ. v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979); W.T. Grant Co. v. Haines, 531 F.2d 671, 677 (2d Cir. 1976); Government of India v. Cook Indus., 422 F. Supp. 1057, 1063 (S.D.N.Y. 1976). Similarly, courts sometimes rely on the doctrine of laches to deny disqualification when the motion is filed long after the litigation has begun and the opposing party has committed substantial resources to the case. *See* Redd v. Shell Oil Co., 518 F.2d 311, 315 (10th Cir. 1975); White v. Superior Court, 98 Cal. App. 3d 51, 55-56, 159 Cal. Rptr. 278, 280 (1979).

In a criminal case, the defendant may experience additional difficulty in trying to obtain from his original lawyer a refund of that portion of the fee which the lawyer cannot fairly retain for work already expended on the case. *See* People v. Blalock, 592 P.2d 406, 408 (Colo. 1979); People v. Manos, 66 A.D.2d 922, 923, 410 N.Y.S.2d 941, 942 (1978). If, however, defense counsel was remiss in not discovering or reporting the conflict at an earlier stage in the proceedings, the court may order him to return a portion of the fee. *See* Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978) (court has inherent power to inquire into amount charged by an attorney in order to protect client from excessive fees).

265. The court's own expense is a fair consideration to be weighed in deciding a disqualification motion, at least in some circumstances. *See* Society for Good Will to Retarded Children, Inc. v. Carey, 466 F. Supp. 722, 725 (E.D.N.Y. 1979) ("needs of efficient judicial administration" must be weighed against possible "advantage of immediate preventive measures" in disqualification motions).

There are other costs of disqualification for the defendant, often intangible but nevertheless considerable. For example, there is a substantial value in continuity of representation in preparation for trial.[266] A thorough assessment of a disqualification motion involves weighing all these costs against the interest of the government witness and the court's own interest in the integrity and efficiency of the judicial process.

4. *The Court's Interest in Disqualification*

It is misleading to discuss the court's own interest in a disqualification motion independently of the interests of the government, witness, and defendant because those respective interests in large part define the public interest in each case. For example, if in a particular case the risk of defense counsel making improper use of confidential information in a client's file is small, the government's concern that the defense will have an unfair advantage is minimized. The public interest is therefore subordinate to the court's obligation to assure the defendant's right to counsel of his choice. Nevertheless, it is useful to analyze disqualification from the court's viewpoint to place each of the parties' interests in perspective. There are also aspects of the court's interest that diverge from those of the parties and that may require the granting or denial of disqualification in an individual case.

Some courts, for example, have disqualified defense counsel on the ground that the lawyer's familiarity with a former client testifying for the government has resulted in an unfair advantage for the defense, frustrating the equity of the adversary process.[267] This rationale, however, can be used either as a justification for a decision to disqualify counsel or as a means to limit disqualification to those situations in which the lawyer's familarity with the witness actually has an impact on the competitive balance of the trial. The latter approach respects the defendant's Sixth Amendment right to counsel and the considerable hardships that result from a disqualification order.[268]

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266. A lawyer who has cross-examined prosecution witnessses at a preliminary hearing or in pretrial motions is familiar with the manner in which those witnesses respond to questions and the way in which they relate to him in a courtroom setting. Such insight can be invaluable in planning cross-examination for trial. Substitute counsel not only loses these advantages of continuity, but must also prepare for trial more quickly. This can be a serious problem when there are numerous witnesses in the case and time is important—either because the defendant is in custody or because the speedy trial requirements of the jurisdiction limit the duration of pre-trial continuances. *See* Speedy Trial Act of 1974, 18 U.S.C. §§ 3161-3174 (Supp. V 1981).

267. *See* United States v. Ostrer, 597 F.2d 337, 340 (2d Cir. 1979); State v. Morelli, 152 N.J. Super. 67, 73-74, 377 A.2d 774, 777 (1977).

268. An analogous situation occurs in connection with government motions to disqualify defense counsel from representing multiple grand jury witnesses. The courts sometimes disqualify counsel if they conclude that the integrity of the grand jury itself is threatened by multiple representation. *See In*

The Second Circuit has formulated a doctrine in civil cases that utilizes concern for fairness in the adversarial process as a necessary condition for disqualification. That court concluded in *Board of Education v. Nyquist*[269] that disqualification should be ordered only "where necessary to perserve the integrity of the adversary process"[270] or to prevent an unfair advantage that will "taint the underlying trial."[271] Restricting disqualification to situations in which the public interest is impaired was necessary, according to the court, not only because of the hardship imposed by a disqualification order but also because disqualification is sought frequently for reasons of tactical advantage rather than true concern for protecting confidential information.[272]

The *Nyquist* doctrine makes sense when applied in criminal cases. An imbalance in the adversary process can occur, for example, when counsel is in possession of police reports, psychiatric evaluations, or presentence investigation reports from the earlier representation and those reports or evaluations of the witness are useful for cross-examination on related issues. However, disqualification may be too extreme a remedy in many cases, especially when the costs of disqualification are substantial for the defendant. Questionable tactical motivations for disqualification motions are just as likely in criminal cases as they are in civil litigation, and the principle of respecting a litigant's choice of counsel is constitutionally compelled in criminal cases.

Applying *Nyquist* to successive representation in criminal cases would not entail a departure from established principles. *Nyquist*'s concept of "preserving the integrity of the adversarial process" includes, of course, those cases in which "the attorney is at least potentially in a position to use privileged information concerning the other side."[273] These circumstances would occur when a substantial relationship exists between the prior representation and the contested issues in the current case, and the

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re Gopman, 531 F.2d 262, 268 (5th Cir. 1976); *In re* Investigation Before April 1975 Grand Jury, 531 F.2d 600, 606 (D.C. Cir. 1976); Pirillo v. Takiff, 462 Pa. 511, 529-30, 341 A.2d 896, 901 (1975), *aff'd per curiam on rehearing*, 466 Pa. 187, 352 A.2d 11, *cert. denied*, 423 U.S. 1083 (1976). Joint representation can frustrate the grand jury's investigative function if it results in witness collusion or if the secrecy of the proceedings is undermined. Although some courts have assumed that the integrity of the grand jury process is impaired by the mere fact of joint representation, *see In re* Gopman, 531 F.2d at 266, other decisions have required the government to produce concrete evidence that the attorney's continued representation of multiple witnesses would obstruct the grand jury's investigation, *see* SEC v. Csapo, 533 F.2d 7, 11-12 (D.C. Cir. 1976). The latter approach uses the public interest not as a rationalization for disqualifying counsel, but instead as a necessary condition for disqualification, to permit interference with the witness's free choice of counsel only when it can be shown to infect the fact-finding process.

269. 590 F.2d 1241 (2d Cir. 1979).

270. *Id.* at 1246.

271. *Id.*

272. *Id.*

273. *Id.*

earlier lawyer-client relationship was such that the lawyer had access to the type of information that could be useful in cross-examining the witness. In addition, if the witness is very important to the prosecution's case and the assessment by the trier of fact of the witness's credibility is crucial, the fact-finding process is likely to be affected by any conflict of interest. Since the public interest in preserving the integrity of the fact-finding process is, under *Nyquist*, a necessary condition for the imposition of disqualification, trial courts should require the government to make a concrete showing, as part of the inquiry into the existence of a substantial relationship, that the adversarial process may be impaired, before granting disqualification over the defendant's objection.

In weighing the public interest, the court should also consider both the costs of disqualification to the administration of justice and the avaliable alternatives to disqualification. Particularly when disqualification occurs shortly before the scheduled date of trial in a case involving complex or protracted issues, it can result in substantial expense and delay, upsetting the efficient operation of a court calendar, causing inconvenience for witnesses, and interfering with the public interest in a speedy trial. On the other hand, viable alternatives that preserve the fairness of the fact-finding process may exist.[274] For example, defense counsel and the defendant may agree to restrict cross-examination to matters not closely related to the prior client-lawyer relationship.[275] The court might also consider after the fact discipline of defense counsel as an alternative to the preventative remedy of disqualification.[276]

V. Conclusion

The tendency of the courts to overlook the complexities of successive representation and the lack of coherence in dealing with the resulting

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274. One alternative to disqualification recently discussed approvingly by the Eighth Circuit would be for the defendant to retain, or the court to appoint, a back-up counsel who would conduct the cross-examination of the problem witness. This would permit the defendant's counsel of choice to remain in the case, conducting all other phases of the trial. *See* United States v. Agosto, 675 F.2d 965, 974 (8th Cir. 1982); Tague, *supra* note 10, at 1115. This approach should be considered with caution, however, since the cross-examination will have to be coordinated with the other aspects of the trial, particularly the closing argument for the defense. Preparation by back-up counsel for the cross-examination might be difficult and time-consuming in some cases, reducing significantly the advantages to be gained.

275. *See* United States v. Cunningham, 672 F.2d 1064, 1073 (2d Cir. 1982).

276. Several courts have held that they have inherent authority to supervise the practice of attorneys appearing before them. *See* Coffelt v. Shell, 577 F.2d 30, 32 (8th Cir. 1978). Presumably, this is the authority courts exercise when they disqualify lawyers or firms from particular cases. *See* United States v. Agosto, 675 F.2d 965, 969 (8th Cir. 1982). When a privately retained lawyer has provided ineffective assistance of counsel for a criminal defendant because of a conflict of interest or a lack of diligence, some courts have exercised their supervisory power to reduce the lawyer's fee and order a return of money paid to the lawyer by the client. *See* Coffelt v. Shell, 577 F.2d at 32; United States v. Vague, 521 F. Supp. 147, 157 (N.D. Ill. 1981). Whether analogous sanctions could be applied against salaried public defenders is not clear.

problems can be traced to three sources. First, the bar itself ignored successive representation as an issue worthy of analysis in its rules of professional responsibility, at least before the recently proposed *Model Rules.* Without a normative framework to provide guidance to practitioners, individual lawyers have formulated their own rules of conduct, with no uniformity. Second, unlike joint representation of criminal co-defendants, successive representation in criminal defense is not a highly visible phenomenon. When it occurs, the trial court usually is unaware of the risk that a conflict of interest may develop. Third, the former client in criminal litigation is not a party and is not represented by counsel. Therefore, there is no mechanism similar to the disqualification motion in civil litigation to bring the issue to the attention of the trial court for preventative action.

If more direction is provided to criminal lawyers in the first instance, and trial courts are alerted to the circumstance of successive representation sufficiently in advance of trial to avert potential problems, the fairness and reliability of the criminal justice system will be increased. Rule 1.9 of the *Model Rules* is a step in the right direction, especially if ambiguities in the language of the rule can be eliminated.[277] Since Rule 1.9 presumably applies the civil disqualification standard to criminal practitioners, a logical innovation in criminal procedure would be the adoption of a mechanism similar to the civil disqualification motion to raise the issue in the criminal courts. Avoiding a potential problem before it has the opportunity to arise certainly is preferable to speculating about its effect after-the-fact or ignoring it completely, as now occurs too frequently.

A pre-trial judicial inquiry to determine the existence and potential effects of successive representation is sorely needed. Although the approach suggested in this article will not eliminate the problems of divided loyalty that occur when a former client of defense counsel testifies for the prosecution, at least it will assure that each player in the drama is acting with an awareness of the risks. The judicial inquiry approach will not eliminate adversarial abuses of the disqualification mechanism. However, if disqualification is seen as a careful balancing of the competing interests in each case, the risk of disqualification motions based on questionable motives can be minimized. An ounce of prevention truly is worth a pound of cure.

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277. *See supra* pp. 22, 23.